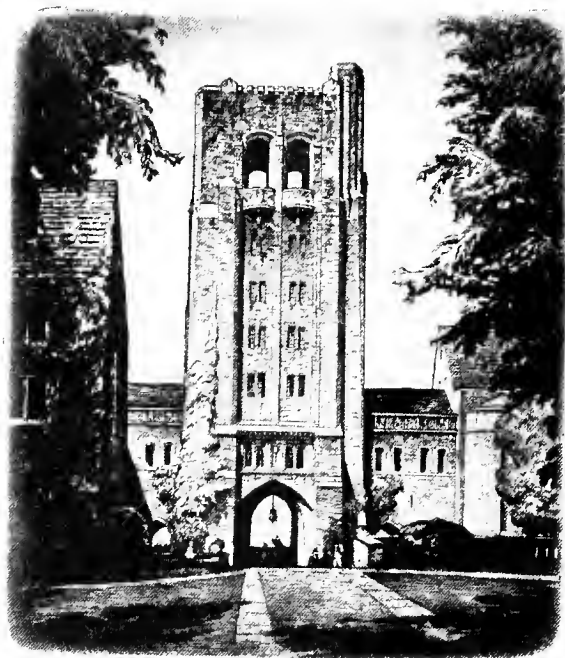


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A COMPENDIUM
OF
THE LAW OF TORTS

Specially adapted for the Use of Students.

BY

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PREFACE

TO THE FOURTH EDITION.



IN preparing the present edition for the Press, the book has been thoroughly revised and brought up to date. I have made no alteration in the plan or general arrangement of the work, and have endeavoured, as far as possible, not to increase its size.

H. F.

4, ELM COURT, TEMPLE, E.C.

October 3rd, 1898.

EXTRACT FROM
PREFACE TO THE FIRST EDITION.

I AM under an obligation to the Liverpool Board of Legal Studies to supply the students who attended my lectures at Liverpool with a printed analysis of the same. The idea that such an analysis might be of some use to other students has induced me to publish this little book, which professes to be nothing more than rough notes of the outlines of my lectures delivered at Liverpool and Newcastle-upon-Tyne in the early part of last year. It was compiled, in the first instance, with the object of assisting those of my own pupils who wished to enter upon the course of study which I indicated to them in my lectures; and in preparing my notes for the press I had that object solely in view. It is not intended to be used as a cram-book, nor do I imagine that a parrot's knowledge of its contents would enable any student, foolish enough to attempt to acquire it, to cheat a competent examiner into the belief that he had properly studied the Law of Torts; if, indeed, I had thought so, these pages would never have seen the light. I venture to hope, however, that it may prove of service as an inducement to study the Law

of Torts in the reported cases and in the various works I have referred to, and may prove of value to those who wish to be directed to the best sources of information on this branch of the law.

I have endeavoured, as far as possible, to acknowledge my indebtedness to other writers in the body of my work; but I wish here to specially acknowledge my sense of indebtedness to Mr. Frederick Pollock's luminous and masterly treatise on the Law of Torts, which no student who wishes to thoroughly master the subject should omit to read and study carefully.

H. F.

2, CLOISTERS, TEMPLE, E.C.,

March 16th, 1888.

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LIST OF ABBREVIATIONS.



A. & E.	Adolphus and Ellis.
Ad. & Ecc.....	Admiralty and Ecclesiastical Cases (L. R.)
App. Cas.	Appeal Cases (L. R.).
B. & A.	Barnewall and Alderson.
B. & Ad.....	Barnewall and Adolphus.
B. & C.	Barnewall and Cresswell.
B. & P.	Bosanquet and Puller.
B. & S.	Best and Smith.
Barn.	Barnardiston.
Bing.	Bingham.
Bing. N. C.	Bingham, New Cases.
Bur.	Burrow.
C. A.	Court of Appeal.
C. B.	Common Bench Reports.
C. B. N. S.	Common Bench, New Series.
C. C. R.	Court of Crown Cases Reserved (L. R.).
C. P.	Common Pleas (L. R. and L. J.).
C. P. D.	Common Pleas Division (L. R.).
C. & P.	Carrington and Payne.
Camp.	Campbell.
Ch.	Chancery (L. R. and L. J.).
(1891), (1892), 1, 2, &c.	
Ch.	(1891), (1892), Law Reports, 1, 2, &c., Chancery Division.
Ch. D. or Ch. Div. ..	Chancery Division (L. R.).
Coke's Rep.	Coke's Reports.
Cro. Eliz.	Croke's Reports, temp. Elizabeth.

- De G. M. & G. De Gex, Macnaghten and Gordon's Reports.
- Dowl. N. S. Dowling, New Series.
- E. & B. Ellis and Blackburn.
- E. B. & E. Ellis, Blackburn and Ellis.
- E. & E. Ellis and Ellis.
- Eq. Equity (L. R.).
- Esp. Espinasse.
- Ex. Exchequer Reports, Exchequer (L. R. and L. J.).
- Ex. D. or Ex. Div. ... Exchequer Division (L. R.).
- Ex. Ch., C. B. N. S. ... Exchequer Chamber, Common Bench Reports, New Series.
- Ex. Rep. Exchequer Reports.
- F. & F. Foster and Finlason.
- H. & C. Hurlstone and Coltman.
- H. & N. Hurlstone and Norman.
- H. L. House of Lords (L. R.).
- H. L. C. House of Lords Cases, by Clark and Finnelly—continued by Clark.
- Hagg. Haggard.
- Hob. Hobart's Reports.
- I. R. C. L. Irish Reports, Common Law.
- J. P. Justice of the Peace.
- Jur. N. S. Jurist, New Series.
- L. J. Law Journal.
- L. J. N. C. Law Journal, New Cases.
- L. R. Law Reports.
- L. R. Ir. Law Reports, Irish.
- L. R. Ch. App. Law Reports, Chancery Appeals.
- L. R. Sc. App. Law Reports, Scotch Appeals.
- L. R. Sc. & D. Law Reports, Scotch and Divorce Appeals.

Ld. Raym.	Ld. Raymond's Reports.
Lofft	Lofft's Reports.
M. & G.	Manning and Granger.
M. P. C. C.	Moore's Privy Council Cases.
M. & S.	Maule and Selwyn.
M. & W.	Meeson and Welsby.
Mod.	Modern Reports.
Moo. & M.	Moody and Malkin's Reports.
Moo. & R.	Moody and Robinson's Reports.
N. & M.	Neville and Manning's Reports.
N. Y.	New York.
P. C.	Privy Council (L. R. and L. J.).
P. W.	Peere Williams.
Palm.	Palmer.
Q. B.	Queen's Bench Reports, Queen's Bench (L. R. and L. J.).
(1891), (1892), &c., 1,	
2, &c., Q. B.	(1891), (1892), &c., 1, 2, &c., Law Reports, Queen's Bench Division.
Q. B. D.	Queen's Bench Division (L. R. and L. J.).
R. & M.	Ryan and Moody.
R. R.	Revised Reports.
Rep.	Coke's Reports.
Salk.	Salkeld.
Sid.	Siderfin.
Sim. N. S.	Simons, New Series.
Sm. L. C.	Smith's Leading Cases.
Stark.	Starkie.
Swanst.	Swanston.
T. R.	Term Reports.
Taunt.	Taunton.

Ves. Vesey.

W. N. Weekly Notes.

W. R. Weekly Reporter.

Wm. B. William Blackstone.

Y. B. Year Books.

Yelv. Yelverton.

The Law of Torts.

CHAPTER I.

OF TORT IN GENERAL.

To define a tort is well known to be difficult and unsatisfactory. The best summary of the elements of which it is composed is that given by Sir Frederick Pollock (*Law of Torts*, 5th ed., pp. 19, 20), and to this the reader is referred. Certain distinguishing marks, we may, however, notice.

On the one hand, a tort is to be distinguished from crime: on the other, from breach of contract.

It differs from crime in respect of three considerations:—

(1) As regards the consequences of the act or omission.—A crime is regarded more as an injury to the whole community, considered in its social aggregate capacity; while a tort is regarded rather as an injury to a private individual, its consequences being deemed less deleterious to the community at large.

(2) As regards the nature of the redress or remedy.—In tort, the wrongdoer has to compensate the injured party, while in crime he is punished by the state.

(3) **As regards procedure.**—In tort, the action is brought by the injured party; in crime, proceedings are conducted in the name of the sovereign.

All the three elements of difference go to make up the distinction. Blackstone (*a*), the Institutes of Justinian, and Professor Holland (*b*), rely only on the first; Austin (*c*) on the third.

It differs from breach of contract, in that a tort is an infringement of a general right or a right in rem—*i.e.*, a right available against the world at large; whereas breach of contract is an infringement of a right *in personam*—*i.e.*, a right available against a definite person or persons.

It is also to be distinguished from breach of certain personal relations, such, for example, as exist between a trustee and his *cestui que trust*, a husband and his wife, a shipowner and his salvors (*d*).

The newness of a tort is no objection to an action if it come within any principle upon which the courts act; but the court will grant no relief if it embraces some entirely new principle (*e*).

(*a*) Stephen's Commentaries, 12th ed. vol. iv. p. 3.

(*b*) Holland's Jurisprudence, 8th ed. pp. 333, 334.

(*c*) Austin's Jurisprudence, 5th ed. vol. i. pp. 404, 405.

(*d*) For the general theory determining liability in tort, the student is referred to that most masterly of modern law books, "The Common Law," by Mr. Justice O. W. Holmes, Lectures III. and IV.; more particularly pp. 161—163.

(*e*) Per Ashurst, J., in *Pasley v. Freeman* (1789), 3 T. R. 51; 1 R. R. 634.

Where there is *injuria sine damno*, *i.e.*, the infringement of a legal right without any actual loss or damage, the person whose right is infringed has a cause of action. Thus in *Ashby v. White* (*f*), the defendant, a returning officer, wrongfully refused to register a duly tendered vote of the plaintiff, a legally qualified voter. The candidate for whom the vote was tendered was elected, and no loss was suffered by the rejection of the vote; nevertheless, it was held that an action lay (*g*).

Where there is *damnum sine injuria*, *i.e.*, actual and substantial loss without infringement of any legal right, no action lies: *e.g.*, A. and B. are rival schoolmasters; A. sets up a rival school next door to B.'s, and boys from B.'s school flock to A.'s. B. has no right of action against A., for no legal right has been infringed (*h*).

(*f*) 1 Sm. L. C. 10th ed. 231.

(*g*) It is worth noticing, however, that Holt, C. J., expressly negatived the doctrine of *injuria sine damno*. See *The Judgments delivered by Chief Justice Holt, &c.*, published by Messrs. Saunders & Benning, London, 1837.

(*h*) *Gloucester Grammar School case* (1410-11), in Year Book of 11 Henry 4, 47, pl. 21; *Chasemore v. Richards* (1859), 7 H. L. C. 349; and see *infra*, pp. 18-19, and p. 50.

CHAPTER II.

OF VARIATIONS IN THE NORMAL RIGHT TO SUE
ARISING FROM PERSONAL DISABILITY.

CERTAIN persons are not capable of suing or liable to be sued in tort owing to personal disability.

Categories of such persons.

A convict whose sentence is in force and unexpired, and who is not "lawfully at large under any licence," cannot sue "for the recovery of any property, debt, or damage whatsoever" (33 & 34 Vict. c. 23, ss. 8, 30). Nor can an alien enemy.

An infant may be sued for a tort, but not when it would have the effect of making him liable on a contract which he could not otherwise be liable upon; but the doctrine does not extend to protect an infant from the consequences of a wrong which has been induced by, and has arisen out of, a contract, but which is independent of the contract, in the sense of not being an act of the kind contemplated by it. In *Jennings v. Rundall*(a), the defendant, who was an infant, hired a mare for riding, and injured it by over-riding. Held, defendant's infancy was a good defence, the action being founded on contract. In

(a) (1799), 8 T. R. 335 ; 4 R. R. 680.

Burnard v. Haggis (b), there was a similar contract, but defendant was expressly told that the mare was unfit for leaping. The mare was put at a fence, and in attempting to take it fell upon a stake, and was so injured that she died. Held, that the infant had committed an actionable wrong, and was therefore liable irrespective of the contract.

Further, an infant is not allowed to take advantage of his own fraud, and will be liable in equity to make restitution, where that is possible, for any advantage he has thereby gained (c).

Married women at common law were not liable upon contracts, and, consequently, the same rule applied to the contract of a married woman as to that of an infant—that it could not be indirectly enforced by framing the pleadings in tort. In all real cases of tort, however, a married woman is as liable as anybody else; but inasmuch as in the eye of the law she had no property of her own with which she could pay damages, her husband had to be sued jointly with her (d).

Under the **Married Women's Property Act, 1882** (45 & 46 Vict. c. 75), the wife is liable for her antenuptial torts, and may be sued for them, and sums

(b) (1863), 14 C. B. N. S. 45.

(c) *Bartlett v. Wells* (1862), 31 L. J. Q. B. 57; *Lemprière v. Lange* (1879), 12 Ch. D. 675.

(d) *Liverpool Adelphi Loan Association v. Fairhurst and Wife* (1854), 9 Ex. Rep. 422.

recovered against her are to be paid out of her separate property (*e*): the husband is also liable to the extent of the property he has obtained through his wife (*f*), and may be sued jointly with her or alone (*g*).

For torts committed by or against a wife during marriage she is sued or sues just as a feme sole, and sums recovered against her are to be paid out of her separate estate, and sums she recovers are part of her separate estate (*h*). The husband may or may not be joined with her in these actions, since the case of *Seroka v. Kattenburg* (*i*) has decided that the husband's old common law liability for his wife's torts committed during marriage is not interfered with by the Act.

As to torts committed against the wife by her husband, the wife may sue her husband for the protection and security of her own separate property; but further than that, no husband or wife shall be entitled to sue the other in tort (*k*).

For a long while difficulties, due rather to considerations of procedure than to any fancied obstacle arising from a corporation's artificial personality, were felt in admitting that a corporation could be sued. In 1812 it was held, in *Yarborough v. Bank*

(*e*) 45 & 46 Vict. c. 75, s. 13.

(*f*) *Ibid.* s. 14.

(*g*) *Ibid.* s. 15.

(*h*) *Ibid.* s. 1, sub-s. 2.

(*i*) (1886), 17 Q. B. D. 177.

(*k*) 45 & 46 Vict. c. 75, s. 12.

of *England* (*l*), that *trover* lay against a corporation; and in 1842, in *Maund v. Monmouthshire Canal Co.* (*m*), that *trespass* also lay. It was formerly doubted whether a corporation, being incapable in its corporate character of a malicious intention, could be liable to an action for malicious prosecution (*n*); but the better opinion at the present day is that it can (*o*). It has now become established that a corporation is liable for torts committed by its servants and agents, provided (1) the thing done is within the purpose of the corporation, and (2) done so that it would be actionable if done by an individual (*p*).

Foreign sovereigns and ambassadors resident in this country can sue in an English court (*q*), but cannot be sued unless, indeed, they waive their privilege by voluntary submission to the jurisdiction or otherwise (*r*).

(*l*) 16 East, 6; 14 R. R. 272.

(*m*) 4 M. & G. 452.

(*n*) *Stevens v. Midland Counties Ry. Co.* (1854), 10 Ex. 352.

(*o*) *Edwards v. Midland Ry. Co.* (1880), 6 Q. B. D. 287; *Kent v. Courage* (1891), 55 J. P. 264; *Rayson v. South London Tramways Co.*, (1893) 2 Q. B. 304. See also Clerk and Lindsell on Torts, 2nd ed. p. 50, note (*g*).

(*p*) See pp. 22—26, *infra*, and the cases there cited.

(*q*) *King of Spain v. Hullett* (1828), 1 Dow & Cl. 169; *Republic of Peru v. Weguelin* (1872), L. R. 7 C. P. 352; (1875), 20 Eq. 140; *Magdalena Steam Navigation Co. v. Martin* (1859), 28 L. J. Q. B. 310.

(*r*) *Duke of Brunswick v. King of Hanover* (1844), 6 Beav. 1, 51; *Taylor v. Best* (1854), 23 L. J. C. P. 89, 93.

CHAPTER III.

OF VARIATIONS IN THE NORMAL RIGHT TO SUE
ARISING FROM THE EXISTENCE OF SPECIAL
CIRCUMSTANCES.

CERTAIN acts would fall within the sphere of tort, rendering the doer liable to an action for damages, were it not for their being of an altogether exceptional nature (*a*).

Categories of such exceptions (*b*).

[Definition.—Actor: a person who does an act which but for special matter of excuse or justification would be actionable.]

I. Privilege of actor.

1. Public.

a. Acts of state.

b. Judicial acts, *i. e.*, acts of judicial officers in the course of their duty.

c. Executive acts, *i. e.*, acts of executive officers in the course of their duty.

(*a*) It is due to Sir Frederick Pollock to state here that I am much indebted to him in respect to this chapter. For a full and exhaustive discussion of its subject-matter the reader is referred to Book I. Chap. IV. of that learned author's treatise on the Law of Torts.

(*b*) The threefold division given in the text does not profess to be anything more than a *rough* classification.

2. Private.

- a. Quasi-judicial acts, *e.g.*, of committee of club.
- b. Disciplinary powers of private persons.
- c. Powers conferred by law.

II. Equal rights.

- 1. Inevitable accident.
- 2. Exercise of common rights, *e.g.*, trade competition.

III. Sufferer disentitled.

- 1. Leave and licence.
- 2. Self-defence.
- 3. Acts of necessity.

I. Privilege of actor.

1. Public.

a. An act of state is either—

- (i.) An act done by a foreign prince or ruler or his representative, *e.g.*, the ambassador of some other sovereign state, in his political capacity (*c*) ; or
- (ii.) An act done by a representative of the Crown (previously sanctioned or subsequently ratified by the Crown),

(c) *Secretary of State in Council of India v. Kamachee Boye Sahaba* (1859), 13 M. P. C. C. 22.

affecting the person or property of some one not a British subject.

In *Buron v. Denman* (*d*), plaintiff sued defendant, a naval captain, for burning plaintiff's barracoons and releasing slaves in them. It was held that defendant was not liable, having acted in the capacity of an officer of the Crown, and the Crown having accepted his act as its own.

There is no liability for acts of this kind.

As between a sovereign and his subjects, there is no such thing as an act of state; *i.e.*, to plead the sovereign's command is no excuse, unless such command is lawful in itself, "for the warrant of no man, not even of the king himself, can excuse the doing of an illegal act" (*e*). It is for the court to determine whether the command is, or is not, lawful.

- b. Judicial acts.*—Judges of superior courts,—*i.e.*, the House of Lords, the Judicial Committee of the Privy Council, the Court of Appeal, the High Court of Justice and any Divisional Court there—

(*d*) (1859), 2 Ex. Rep. 167.

(*e*) Per cur. in *Sands v. Child and others* (1693), 3 Lev. 352.

of (*f*), Courts of Nisi Prius and Assize (*g*),—are not liable for acts done in their judicial capacity, or for errors of judgment; but—

- (i.) By 31 Car. 2, c. 2, s. 9, a judge in vacation who refuses to grant a writ of *habeas corpus* is liable;
- (ii.) By 13 Edw. 1 (st. West. 2), c. 31, a judge who refuses to seal a bill of exceptions is liable (*h*).

The same immunity applies to judges of inferior courts, but in a superior court it is presumed that everything is within its jurisdiction, and plaintiff must prove the contrary. In inferior courts, there is no such presumption, and the judge must prove that the act complained of is within his jurisdiction (*i*).

Members of naval and military courts-martial are not liable for acts done in their capacity as such (*j*).

An arbitrator, as being *in loco judicis*, if acting honestly is not liable for errors

(*f*) Judicature Act, 1873, s. 29.

(*g*) *Ex parte Fernandez* (1861), 30 L. J. C. P. 321.

(*h*) This practice is now obsolete.

(*i*) *Houlden v. Smith* (1850), 14 Q. B. 841.

(*j*) *Dawkins v. Lord Rokeby* (1875), L. R. 7 H. L. 744; *Dawkins v. Prince Edward of Saxe-Weimar* (1876), 1 Q. B. D. 499.

in judgment (*k*) ; but he is, of course, liable for fraud or collusion (*l*).

c. Executive acts.—No action lies against a public officer for the regular enforcement of any sentence or process of law within the jurisdiction of the court under whose authority he acts, but he must act “in a manner in itself reasonable, and in execution of an apparently regular warrant or order, which, on the face of it, he is bound to obey” (*m*). Where, however, the court issuing process has no jurisdiction, officers are liable at common law (*n*) ; but a constable or officer acting under a justice’s warrant is protected by 24 Geo. 2, c. 44, s. 6, if he produce a copy of such warrant within six days of demand.

By the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), every action brought against any person for any act in pursuance or execution or intended execution of any statutory or public duty or authority, must be brought

(*k*) *Stevenson v. Watson* (architect nominated to certify what was due to contractor) (1879), 4 C. P. D. 148.

(*l*) *Ibid.* See also *Pappa v. Rose* (1872), L. R. 7 C. P. 525.

(*m*) Pollock, 5th ed. p. 112. See also *Mayor of London v. Cox* (1867), 2 H. L. at p. 269.

(*n*) *Clark v. Woods* (1848), 2 Ex. 395.

within six months from the date of the act complained of, and the defendant is entitled, in lieu of or in addition to any other plea, to plead tender of amends before the action was commenced. The Act also provides (o) that if the plaintiff has not, in the opinion of the court, afforded the defendant sufficient opportunity of tendering amends before the commencement of the action, the court may award costs to the defendant.

2. Private.

a. **Quasi-judicial acts**, *e.g.*, acts of universities, colleges, club committees, Inns of Court.

Persons exercising quasi-judicial powers are not liable for removing a man from office or membership, or otherwise dealing with him to his disadvantage, provided they—

- (1) act in good faith ;
- (2) give him a fair and sufficient notice of his offence ;
- (3) give him an opportunity of defending himself ;
- (4) observe the rules (if any) laid down by statute or by the particular body to which they belong.

If these conditions are satisfied the court

(o) Section 1, sub-s. (d).

will not interfere, even if it thinks the decision is wrong (*o*).

If the statute give absolute discretionary powers there is no necessity to show proceedings in the nature of judicial proceedings, or, indeed, any reason at all for the act complained of (*p*).

b. Disciplinary powers of private persons.

Parents and persons *in loco parentis* are not liable for exercising summary force and restraint, if acting *bonâ fide* and in a reasonable and moderate manner (*q*).

The master of a merchant ship has by necessity the right of using force to preserve order and discipline (*r*); but where the case admits of delay, proper inquiry should precede the act.

c. Powers conferred by law.

Where damage incidentally arises from an act authorized by statute, no action lies if

(*o*) *Dawkins v. Antrobus* (plaintiff expelled from club) (1881), 17 Ch. D. 615.

(*p*) *Hayman v. Governors of Rugby School* (1874), 18 Eq. 28.

(*q*) Blackstone, i. 453; *In re Agar-Ellis* (1883), 24 Ch. D. 321; *Cleary v. Booth*, (1893) 1 Q. B. 465; and see modern examples collected in Clerk and Lindsell on Torts, 2nd ed. pp. 180—182.

(*r*) Per Lord Stowell, in *The Agincourt* (1824), 1 Hagg. 271, 274; 33 R. R. 717.

such act be done with judgment and caution (*s*), and the injured party can only recover such compensation as the statute gives him (*t*). In *Rex v. Pease* (*u*), it was held that where the legislature has authorized a railway company to lay down a railway alongside a public highway, it must be presumed to have contemplated the possibility that the railway would be a nuisance to persons using the highway, and that such persons must submit to the inconvenience necessarily resulting from the working of the railway. This case was confirmed and extended in *Hammersmith Railway Co. v. Brand* (*x*), where it was held that the Lands Clauses Consolidation Act and Railway Clauses Consolidation Act do not contain provisions under which a person whose land is not taken by the railway company can obtain statutory compensation for damage occasioned, without negligence, by the vibration of passing trains.

In *L. B. & S. C. Railway Co. v. Truman* (*y*),

(*s*) Per Lord Truro, in *L. & N. W. Ry. Co. v. Bradley* (1851), 3 Mac. & G. at p. 341.

(*t*) Per Lord Blackburn, in *Geddis v. Proprietors of Bann Reservoir* (1878), 3 App. Cas. at p. 455.

(*u*) (1832), 4 B. & Ad. 42.

(*x*) 1869, L. R. 4 H. L. 171.

(*y*) (1885), 11 App. Cas. 45.

the appellant company was held not liable to occupiers of houses near the company's station for noises and annoyance caused by cattle and drovers on the company's land.

In *Vaughan v. Taff Vale Railway Co.* (z), the defendant company was held not liable for damage caused by sparks from their engines setting fire to the dry plantation of the plaintiff, as they were authorized to use such engines, and had adopted every precaution which science could suggest to prevent injury.

In *Smith v. L. & S. W. Railway Co.* (a), defendant company's workmen in a hot summer left some cut grass lying for a fortnight close to the line. The sparks from an engine set fire to this dry grass, and the fire, thus begun, spread, and ultimately burnt down plaintiff's cottage. Held, defendants were liable, having been guilty of negligence.

These cases where the statute "directs that a thing shall at all events be done," as in *Hammersmith Railway Co. v. Brand* (b), must be distinguished from those in which only a discretionary power, with choice

(z) (1860), Ex. Ch. 6 H. & N. 679. See also *Sadler v. South Staffordshire, &c. Co.* (1889), 23 Q. B. D. 17; *Harrison v. Southwark and Vauxhall Water Co.*, (1891) 2 Ch. 409; *Port Glasgow Sailcloth Co. v. Caledonian Ry. Co.* (1893), Sess. Cas. ser. iv. vol. 20, p. 35.

(a) (1870), L. R. 6 C. P. 14.

(b) *Supra*, p. 15.

of time and place, is given. In the latter case due regard to the common rights of others must be taken.

In *Metropolitan Asylum District Board v. Hill* (c), it was held that a district board could not set up a statute authorizing a small-pox hospital as an answer to an action, or to prevent an injunction issuing to restrain the board from establishing a hospital where the establishment of such hospital would be a nuisance. They must find a different site where they would not be creating a nuisance.

In *Truman v. L. B. & S. C. Railway Co.* (d), Bowen, L. J., mentioned the three types of authorization a statute may give: (1) the statute may authorize a nuisance; (2) it may authorize certain works, provided they can be done without causing a nuisance; or (3) it may authorize works to be carried out, if possible, without a nuisance, but may authorize the nuisance itself, if necessary, in the last resort.

II. Equal rights.

1. Inevitable accident.

It has been a matter of much discussion whether an inevitable accident—*i. e.*, an accident not avoidable by any such precaution as a reasonable man could be expected to take, is a good defence to an action for damages.

(c) (1831), 6 App. Cas. 193. See also *Rapley v. London Tramways Co.*, (1893) 2 Ch. 588.

(d) (1885), 29 Ch. D. at p. 108.

The matter is very fully discussed by Sir Frederick Pollock (see his book, 5th ed., pp. 126—141), and that learned author comes to the conclusion that in English, as in American, law, inevitable accident is a good excuse. “But although inevitable accident, or, as it is sometimes called, the act of God, is an answer when the different rights are co-ordinated by the common law, yet some of those rights which co-exist at common law may, by the express language of some statute, be subordinated to others. In such a case, the words of the statute must receive their natural construction; and, if it appears clear that a liability is imposed, even for the result of inevitable accident, the Courts cannot introduce any exception thereto by intendment of law” (*e*). This is always a matter of construction, and, where the exception would work injustice, the intention of the statute must very clearly appear (*f*).

2. Exercise of common rights.

If a man be injured by the lawful exercise of another's ordinary rights, he has no action; and it is immaterial whether the exercise of

(*e*) Addison on Torts, 7th ed. p. 20.

(*f*) See *River Wear Commissioners v. Adamson* (1877), L. R. 2 App. Cas. 743.

such rights is prompted by a malicious motive (*g*). In the words of Lord Herschell in the House of Lords in the important case of *Allen v. Flood* (*h*), "An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action." Thus, though a man be utterly ruined by his enemy establishing a rival shop across the road, which is carried on at a loss solely to pay off an old grudge, yet is he totally without remedy (*i*). But the defendant must keep well within his rights. Thus, in the case cited, "if a man should lie in wait and fright the boys from going to school, that schoolmaster might have an action for the loss of his scholars" (*k*).

III. Sufferer disentitled.

1. Leave and licence. *Volenti non fit injuria*.

No action is maintainable for damage arising from acts suffered by consent, if such acts

(*g*) Per Lords Watson and Macnaghten, in *Mayor of Bradford v. Pickles*, (1895) App. Cas. at pp. 598, 601. See also *Mogul Steamship Co. v. McGregor, Gow & Co.*, (1892) App. Cas. p. 25.

(*h*) (1898) App. Cas. at p. 135.

(*i*) See *The Gloucester Grammar School case* (1410, 1411), Y. B. 11 Hen. 4, fol. 47, pl. 21.

(*k*) Per Holt, C. J., in *Keeble v. Hickeringill* (1809), 11 East, 576, n.; 11 R. R. 273, n. See also the cases of *Chasemore v. Richards* (*infra*, pp. 57—58), and *Acton v. Blundell* (1843), 12 M. & W. 324.

were not likely nor intended to cause bodily harm. Thus, boxing with padded gloves is lawful, but not fighting with the naked fist; football, because no hurt worth speaking of is likely, but not a kicking match (*l*). But a man may consent to the infliction of bodily harm on himself for some just cause, as, *e.g.*, to a surgical operation.

2. **Self-defence.** Defence of one's own person (*m*), property (*n*), or possession (*o*) is an excuse; but the force employed must not be out of proportion to the apparent urgency of the occasion. It must not exceed what an average reasonable man in a similar position would believe to be necessary; *e.g.*, it is not justifiable to use a deadly weapon to defend oneself from a blow with the hand (*p*).
3. **Acts done of necessity to avoid a greater harm;** *e.g.*, pulling down houses to stop a fire is no doubt excusable (*q*).

(*l*) *Reg. v. Coney* (1882), 8 Q. B. D. per Cave, J., at p. 539, and per Stephen, J., at p. 549.

(*m*) *Dale v. Wood* (1822), 7 Moore, C. P. 33.

(*n*) *Scott v. Shepherd* (1773), 2 Wm. B. 892; and see p. 150, *infra*.

(*o*) *Roberts v. Taylor* (1845), 1 C. B. 126, 127.

(*p*) *Reece v. Taylor* (1835), 4 N. & M., 469.

(*q*) *Dyer*, 36 *b*.

CHAPTER IV.

OF LIABILITY FOR THE WRONGS OF OTHERS.

THE wrongdoer himself is always personally liable, both where he himself has done the act and where he has distinctly authorized it. As regards ratification, however, only such acts bind a principal by subsequent ratification as were done at the time on the principal's behalf (*a*). But what if the party charged says he is acting as the servant of another? In *Cullen v. Thomson's Trustees* (*b*) the managers of a joint-stock company were held personally liable for fraudulent statements, and were not allowed to excuse themselves on the ground that they had acted as the servants or agents of the directors in making such statements; and Lord Westbury, L.C., said "all persons directly concerned in the commission of a fraud are to be treated as principals, and must not be permitted to excuse themselves on the ground that they acted as the agents or servants of others; for the contract of agency or service cannot impose any obligation on the agent or servant to commit,

(*a*) *Wilson v. Tumman* (1843), 6 M. & G. 236.

(*b*) (1862), 4 Macqueen's Scotch App. 424.

or assist in the committing of, fraud.” And this is equally true of all wrongs besides fraud.

Liability of a master for the wrongful acts or omissions of his servants.—A master is responsible for the wrongful acts or omissions of his servant committed in the course of his employment, whether the wrong be committed negligently, wantonly, or even wilfully, and though no express command or privity of the master be proved.

This is the general rule: we have thus two points to consider:—I. What is “the course of the employment”? and II. Who is to be deemed a servant? Of these in their order:—

I. What is “the course of the employment”?

In *Limpus v. London General Omnibus Co. (c)*, the driver of defendants’ omnibus drove it across the road in front of plaintiff’s rival omnibus, which was thereby overturned. Defendants had expressly forbidden their drivers to obstruct any omnibus. Held, that defendants were liable, the question being (per Willes, J.), “did the servant do it to serve his master’s interests, or did he act merely from private spite, and with the intention of injuring his enemy”? The master is liable in the former, but not in the latter case (*d*).

(c) (1862), 32 L. J. Ex. 34.

(d) See also *Seymour v. Greenwood* (1861), 7 H. & N. 355; 30 L. J. Ex. 327; *British Mutual Banking Co. v. Charnwood, &c. Co.* (1877), 18 Q. B. D. 714; *Marsh v. Joseph*, (1897) 1 Ch. 213.

In *Poulton v. L. & S. W. Rail. Co.* (e), a station-master having demanded payment for the carriage of a horse conveyed by defendant company, arrested and detained plaintiff for non-payment thereof until it was ascertained by telegraph that all was right. The railway company had no power to arrest for non-payment of carriage. Therefore, the station-master, in arresting plaintiff, did an act which was wholly illegal, not merely in the mode of doing it, but in the doing of it at all. Held, the railway company were not liable; and Blackburn, J., distinguished this case from *Limpus v. London General Omnibus Co.*, pointing out that there “the act done by the driver was within the scope of his authority, though, no doubt, it was a wrongful and improper act, and therefore his masters were responsible for it. In the present case, an act was done by the station-master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorized him to do, and a thing which could never be right on the part of the company to do. Having no power themselves, they cannot give the station-master any power to do the act. Therefore the wrongful imprisonment is an act for which the plaintiff, if he has a remedy at all, has it against the station-master personally, but not against the railway company” (f).

(e) (1867), L. R. 2 Q. B. 534.

(f) (1862), L. R. 2 Q. B. p. 540.

In *Abrahams v. Deakin* (g), the plaintiff had offered the defendant's barman a ten-mark piece, and on its being refused, gave a half-sovereign in its place, for which he received change. Subsequently the manager of defendant's bar followed the plaintiff and gave him in charge for attempting to pass bad money. Held, that defendant was not liable, for the manager had no implied authority to arrest the plaintiff, for defendant's property was no longer in danger, and the arrest was made only in order to vindicate the law by punishing plaintiff for a criminal offence which he was supposed to have already committed.

Notice four cases on the liability of a railway company for the acts of its servants, two in which the company were held liable, two in which they were not.

Company held liable :—

Bayley v. Manchester, Sheffield and Lincolnshire Rail. Co. (h) : Porter pulls plaintiff out of carriage, thinking he is in the wrong train. Company held liable, on the ground that porter was acting within his general authority. *Goff v. G. N. Rail. Co.* (i) : Company held liable for arrest of plaintiff by mistake

(g) (1891) 1 Q. B. 516 (C. A.); 60 L. J. Q. B. 238.

(h) (1872, 1873), L. R. 7 C. P. 415.

(i) (1870), L. R. 6 Q. B. 65.

of company's servants, servants having authority to arrest for non-payment of fare.

Company not liable :—

Allen v. L. & S. W. Rail. Co. (k) : Company's booking-clerk gave into custody a person suspected of robbing the till, after the attempt had ceased. Held, there was no implied authority for the act, and therefore the company was not liable. *Edwards v. L. & N. W. Rail. Co.* (l) : Defendant company's servant in charge of station arrests plaintiff on suspicion of stealing company's goods. Company held not liable, servant's act being plainly beyond his authority—not part of the company's general business, nor for their apparent benefit.

The master, then, is liable for the wrongs of his servant committed in the course of his employment, and these may include wrongs resulting from the servant's disobedience to positive commands. In *Whatman v. Pearson* (m), a contractor forbade his workmen to leave their horses, or to go home during the dinner hour. Owing to disregard of this order,

(k) (1861), 3 E. & E. 672.

(l) (1870), L. R. 5 C. P. 445.

(m) (1868), L. R. 3 C. P. 422. See also *Engleheart v. Farrant & Co.*, (1897) 1 Q. B. 240, and cf. *Limpus v. London General Omnibus Co.*, *supra*, p. 22.

a horse which was left unattended ran away, and injured plaintiff's railings. The master was held responsible, on the ground that the workman was acting within the general scope of his authority to conduct the horse and cart during the day. On the other hand, where the enterprise is entirely the servant's, so that he may be said to be out "on a frolic of his own" (*n*), the master is not liable. In *Storey v. Ashton* (*o*), a carman, while out on his employer's business, at the request of a fellow servant, went out of his way to fetch something for the latter. While so doing, he ran over the plaintiff. Upon these facts the master was held not liable.

So an employer is liable for the frauds of his servant committed without his authority, but in the course of his service, and for the employer's purposes (*p*).

II. Who is to be deemed a servant?

As stated above (*q*), a man is liable for the wrongs of his servants committed in the course of their employment, but as a general rule (*r*) he is

(*n*) Per Parke, B., in *Joel v. Morrison* (1834), 6 C. P. 501,

(*o*) (1869), L. R. 4 Q. B. 476. See also *Rayner v. Mitchell* (1877), 2 C. P. D. 357; and compare *Stevens v. Woodward* (1881), 6 Q. B. D. 318, with *Ruddiman v. Smith* (1889), 60 L. T. 708.

(*p*) Per cur. in *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Ex. at p. 265; *Houldsworth v. City of Glasgow Bank* (1880), 5 Ap. Ca. 317.

(*q*) p. 22.

(*r*) For the exceptions, see *infra*, pp. 28—30.

not liable for the wrongs of an independent contractor employed by him.

What, then, is an independent contractor, as distinguished from a servant? An independent contractor is one who undertakes to produce a given result, without being in any way controlled as to the method by which he attains that result. A servant, on the other hand, is under the order and control of his master in respect of the means and methods used to attain the end for which he is employed (s).

A person employing an independent contractor is not generally responsible for the wrongful acts or omissions of the contractor. In *Quarman v. Burnett* (t), the defendants hired horses and a coachman from C., and provided their own carriage and livery for the coachman, who received regular wages from C. and two shillings a week from the defendants. Owing to the coachman's negligence in leaving the carriage, the horses bolted and the plaintiff was injured. The defendants were held not liable, as the coachman was not their servant, but the servant of C., an independent contractor.

In *Reedie v. L. & N. W. Rail. Co.* (u), defendant

(s) See the judgment of Compton, J., in *Sadler v. Henlock* (1855), 4 E. & B. 570, 578; also *Donovan v. Laing, &c. Syndicate*, (1893) 1 Q. B. 629 (C. A.), and Pollock, 5th ed. pp. 74, 75.

(t) (1840), 6 M. & W. 499; see also *Jones v. Mayor of Liverpool*, (1885) 14 Q. B. D. 890.

(u) (1849), 4 Exch. 244.

company agreed with certain contractors for the construction of a line ; the company to have the general right of superintending the work, and the power of dismissing incompetent workmen. Owing to the negligence of the contractors' workman, plaintiff's husband was killed, and this was an action under Lord Campbell's Act (9 & 10 Vict. c. 93) against the company. Held, the company was not liable, as the workman was not their servant, but the servant of the independent contractors.

But the person employing the contractor is liable in five cases :—

1. When he personally interferes in the contractor's work. In *Burgess v. Gray* (x), a contractor, employed by defendant to make a drain, left a heap of gravel by the roadside. Defendant paid a navvy to cart it away. This was not properly done, and plaintiff was consequently upset as he was driving home. Held, that the defendant was liable.
2. When the thing contracted to be done is unlawful.—In *Ellis v. Sheffield Gas Consumers' Co.* (y), defendant company, without the necessary special powers, employed a contractor to open trenches in the streets of Sheffield. Plaintiff was injured by falling over a heap of

(x) (1845), 1 C. B. 578.

(y) (1853), 23 L. J. Q. B. 42.

stones left by the contractor. The company was held liable for the contractor's wrongful act.

3. When the thing contracted to be done, though lawful in itself, will naturally be attended by injurious consequences, unless effectually guarded against.—In *Bower v. Peate* (z), defendant employed a contractor to pull down an old house and erect a new one. The contractor expressly undertook to support plaintiff's house, and to be liable for all damage, but defendant was held liable for the damage done. In *Hughes v. Percival* (a), defendant employed a contractor to rebuild a house. The contractor's servants, in so doing, cut through a party-wall and injured plaintiff's house. Defendant was held liable on the ground that the building operations in question were dangerous to plaintiff's house. On the other hand, the person employing the contractor is not liable when the thing contracted to be done is lawful, and not necessarily dangerous (b).

4. When there is a statutory obligation to do the thing properly. In *Hole v. Sittingbourne*

(z) (1876), 1 Q. B. D. 321.

(a) (1883), L. R. 8 App. Cas. 443. See also *Black v. Christchurch Finance Co.*, (1894) App. Cas. 48; *Hardaker v. Idle District Council*, (1896) 1 Q. B. 335.

(b) *Butler v. Hunter* (1862), 31 L. J. Ex. 214.

Rail. Co. (c), the defendant company were authorized by statute to make an opening bridge over a navigable river. A contractor employed by the company made a bridge which would not open, and plaintiff's vessel was thereby prevented from navigating the river. The company was held liable.

5. In cases under sect. 4 of the **Workmen's Compensation Act, 1897** (*d*), which provides that where the "undertakers," as therein defined, employ a contractor, such contractor's servants are to be able to recover compensation under the Act from the "undertakers," without prejudice, however, to the "undertakers'" right to be indemnified by the contractor.

Liability of master to servant for injuries incurred by servant during service.

It will be convenient to consider this subject under three heads, viz.:—(1) The liability of the master at common law; (2) his liability under the Employers' Liability Act, 1880; (3) his liability under the Workmen's Compensation Act, 1897.

As will hereafter be seen, neither of these Acts applies to servants of all kinds. In each case the Act is limited in its application to "workmen," but the defini-

(c) (1861), 6 H. & N. 488.

(d) See pp. 39—41, *infra*.

tion of "workman" in the Workmen's Compensation Act, 1897, is different from, and wider than, that in the Employers' Liability Act, 1880. The Workmen's Compensation Act, 1897, does not repeal or amend the Employers' Liability Act, 1880, but practically supersedes its operation as regards the particular employments to which the later Act applies. Subject to this, the Act of 1880 is still in force.

1. At common law the master was only bound—

1. To take care to provide competent fellow-servants;
2. To take care to provide safe and efficient machinery, or, as it has been put, to take reasonable precautions to insure his servant's safety;

3. Not to be guilty of personal negligence.

The mere relation of master and servant does not imply any agreement on the part of the master to warrant the servant against risks incidental to the employment. Thus, in *Priestley v. Fowler* (*e*), defendant's servant, whose thigh was fractured owing to the overloading of a cart in the charge of another servant, was held disentitled to recover damages. On the other hand, in *Mellors v. Shaw* (*f*), plaintiff, a miner, succeeded in an action against his masters for

(*e*) (1837), 3 M. & W. 1.

(*f*) (1861), 30 L. J. Q. B. 333.

injuries caused by the unsafe condition of the mine ; but there the plaintiff proved that the defendant knew of such unsafe condition.

This is a rule of the common law, but the first decision upon the point was in 1837, in *Priestley v. Fowler* (*supra*) ; and in 1868, in *Wilson v. Merry* (*g*), it was held to extend to injuries caused to a workman by a foreman or person occupying a position of superintendence in the same employment.

Independently, therefore, of the statutory law on the subject, the position of a workman who has sustained personal injuries in the course of his employment is inferior to that of a stranger. For at common law it is open to the employer in any action brought against him by the workman not only to set up every defence which would be available against anyone not in his employment, but, in addition, where the injury was caused by the negligence of a fellow-servant of the workman, the employer can set up the so-called defence of "common employment," since the workman, in entering the employment, is presumed to have accepted this kind of risk.

A person who volunteers to assist servants engaged in their work becomes their fellow-servant, so far as an action for personal injuries is concerned (*h*) ; but where a person aids the servants of another with

(*g*) (1868), L. R. 1 Sc. & D. 326.

(*h*) *Degg v. Midland Ry. Co.* (1857), 1 H. & N. 373.

such other's consent or acquiescence, not as a mere volunteer, but for the purpose of expediting some business of his own, he is not deemed a servant, and so can recover (*i*).

2. Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

This Act was mainly directed against the defence of "common employment," and in cases to which it applies the effect of it is to place the workman in the same position as that of a stranger.

By its provisions any railway servant, or any person to whom the Employers and Workmen Act of 1875 applies—*i.e.*, any labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or person otherwise engaged in manual labour (not being a domestic or menial servant, or a seaman)—and the persons entitled in case of death of any such railway servant or person, are to have the same rights of compensation and remedies against the employer as if such railway servant or person had not been in his service, for any personal injury caused by any of the following reasons:—

- (i) By reason of any defect in the condition of the ways, works, machinery, or plant, used in the employer's business, which defect was caused or remained undiscovered through the negli-

(*i*) *Wright v. L. & N. W. Ry. Co.* (1876), 1 Q. B. D. 252.

gence of the employer, or of some person in his service whose duty it was to see to the condition of such things.

This applies when the defect arises either from original fault of the works, &c., or from want of repair (*j*). It also applies when sound plant is unfit for the use to which it is put (*k*).

- (ii) By reason of the negligence of a person in the service who had any superintendence entrusted to him whilst in the exercise of such superintendence.—Such person must be one whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour. But it was held in *Osborne v. Jackson* (*l*) that a man might be in the exercise of superintendence, though at the time voluntarily assisting in manual labour.
- (iii) By reason of the negligence of a person in the service to whose orders the injured workman is, at the time of the injury, bound to conform, where the injury results from so conforming.
- (iv) By reason of the act or omission of any person in the service done or made in obedience to the rules or bye-laws of the employer, or in

(*j*) *Heske v. Samuelson* (1883), 12 Q. B. D. 30.

(*k*) *Cripps v. Judge* (1884), 13 Q. B. D. 583.

(*l*) (1883), 11 Q. B. D. 619.

obedience to particular instructions of the employer, or of some person duly delegated by him in that behalf, where the injury results from some impropriety or defect in the rules, bye-laws, or instructions. But no bye-law is to be deemed defective which shall have been approved as proper by any department of government under any Act of Parliament.

- (v) By reason of the negligence of a person in the service having the charge or control of any signal, points, locomotive engine, or train upon a railway. This has been held applicable to a private railway (*m*).

Provided that in each of the above cases the workman injured cannot recover if he knew of the defect or negligence, and did not complain to the employer or some person superior to himself in the service, within a reasonable time, unless he was aware that the employer, or such superior, already knew of the said defect or negligence.

In *Thomas v. Quartermaine* (*n*), the plaintiff fell into an insufficiently-fenced cooling vat at the defendant's, his employer's, brewery. It was found that both plaintiff and defendant knew of the defect. It was thereupon held by Bowen and Fry, L. JJ. (Lord Esher, M. R., dissentiente), that the maxim

(*m*) *Doughty v. Firbank* (1883), 10 Q. B. D. 358.

(*n*) (1886), 17 Q. B. D. 414; (1887), 18 Q. B. D. 685 (C. A.).

"*volenti non fit injuria*" applied, and therefore the plaintiff could not recover. This case was further discussed and explained in *Yarmouth v. France* (o), where it was laid down "that if a workman, knowing and appreciating the danger and the risk, elects voluntarily to encounter them, he can no more maintain an action founded upon the statute than he can in cases to which the statute has no application. But the mere fact that the plaintiff knew of the danger, and yet incurred it, is not conclusive" (p). It is important to notice that the maxim is not "*scienti non fit injuria*," but "*volenti non fit injuria*." "Mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim '*volenti non fit injuria*'" (q). Finally, it must be noticed that this interpretation of the law was expressly approved by the House of Lords in the recent case of *Smith v. Baker* (r). But in *Baddeley v. Earl Granville* (s), it was held that the maxim does not apply where the defendant has been guilty of a breach of duty im-

(o) (1887), 19 Q. B. D. 647.

(p) Per Lindley, L. J., at p. 659.

(q) Per Esher, M. R., at p. 657. See also Lord Herschell's judgment in *Membery v. G. W. Rail. Co.* (1889), 14 App. Cas. 179, 190.

(r) (1891) App. Cas. 325.

(s) (1887), 19 Q. B. D. 423.

posed by statute. If the injury result in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of action as the workman himself would have had—*i.e.*, the right of action given by Lord Campbell's Act (*t*) and the Act amending it (*u*).

The amount of damages recoverable is limited to a sum equal to the estimated earnings of a person in the grade, employment, and district of the person injured, during the three years immediately preceding the injury. "Section 3 of the Employers' Liability Act does not give a measure of damages, but the limit of maximum damages which may be awarded under that Act" (*v*).

If a penalty is payable under some other statute it must be deducted from the compensation, and it cannot be received after an action to recover compensation.

Notice of the injury must be given to the employer within six weeks. The action must be commenced within six months, and in the case of death within twelve months. But in the case of death, want of notice is immaterial if the judge think there is reasonable ground for not giving it. The notice

(*t*) 9 & 10 Vict. c. 93. See pp. 174—176, *infra*.

(*u*) 27 & 28 Vict. c. 95. See p. 175, *infra*.

(*v*) Per Cave, J., in *Borlick v. Head* (1885), 34 W. R. 102.

(which must be in writing (*w*), though not necessarily in technical language (*x*)) must give the name and address of the party injured, and state in ordinary language the cause and date of the injury; and it must be served by delivering it at the place of business, or at the residence, of the employer, or by sending it in a registered letter properly addressed to the employer at such place as aforesaid, or at his last-known place of business or residence.

Defects and inaccuracies do not render the notice invalid, unless the judge believe (1) that the defendant is thereby prejudiced in his defence, and (2) that the defect or inaccuracy was for the purpose of misleading (*y*).

Actions under the Act must be brought in the County Court, but may be removed into a superior court on the application of either party in the usual manner.

Munday v. Thames Ironworks Co. (*z*), however, shows that such removal will only be ordered under very exceptional circumstances.

A workman can contract himself out of the Act (*a*), and such a contract is a bar to any claim under Lord Campbell's Act.

(*w*) *Moyle v. Jenkins* (1881), 8 Q. B. D. 116.

(*x*) *Stone v. Hyde* (1882), 9 Q. B. D. 76.

(*y*) *Carter v. Drysdale* (1883), 12 Q. B. D. 91.

(*z*) (1882), 10 Q. B. D. 59.

(*a*) *Griffiths v. Lord Dudley* (1882), 9 Q. B. D. 357.

The operation of the Employers' Liability Act, 1880, has been extended from year to year since the time when it expired in 1887.

3. Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37).

This Act has effected radical changes in the liability of those employers to whom it applies, and has placed the workman who comes within its operation in a far more favourable position than that of a stranger. It has abolished three of the principal defences hitherto open to such employers. In the case of those employments within the Act, the employer who is sued for injuries sustained by the workman in the course of his employment can no longer set up as a defence (i) *volenti non fit injuria* (b), or (ii) inevitable accident (c), or (iii) contributory negligence of the workman (d). The employer is not to be liable if it is proved that the injury is attributable to the serious and wilful misconduct of the workman (e), but this is very far removed from the doctrine of contributory negligence.

The Act is to apply only to an employment by the "undertakers" as therein defined on or in or about a railway, factory, mine, quarry, engineering

(b) See pp. 35—37, *supra*.

(c) See pp. 17—18, *supra*.

(d) See p. 156, *infra*.

(e) Sect. 1 (2) (c).

work, or certain buildings exceeding thirty feet in height (*f*).

Where the injury is caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, the workman can claim compensation under the Act or take the proceedings which were open to him before the Act. In other cases the workman can only claim compensation under the Act (*g*). If a workman brings an action independently of the Act, and it is determined that the injury is one for which the employer is not liable apart from the Act, but that he would have been liable to pay compensation under the Act, the workman may, if he choose, have the compensation assessed under the provisions of the Act (*h*).

Any question as to the liability to pay compensation, or as to the amount or duration of compensation, must be settled by arbitration in accordance with the provisions of the Act (*i*) ; but the amount is not to exceed 300*l.* in case of death, or 1*l.* a week in case of disablement (*j*).

Employers and workmen coming within the Act cannot contract themselves out of it, unless the con-

(*f*) Sect. 7.

(*g*) Sect. 1 (2) (b).

(*h*) Sect. 1 (4).

(*i*) Sect. 1 (3), and Second Schedule.

(*j*) First Schedule.

tract provides a scheme of compensation which the Registrar of Friendly Societies certifies is on the whole not less favourable to the workmen than the Act (*k*).

Notice of the accident must be given as soon as practicable after the happening thereof. The want of or defect or inaccuracy in such notice is not to be a bar to the proceedings, if it is found that the employer is not prejudiced in his defence, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause (*l*).

The claim for compensation must be made within six months of the accident, or, in case of death, within six months of the death (*m*).

(*k*) Sects. 3, 9.

(*l*) Sect. 2 (1).

(*m*) Ibid.

CHAPTER V.

OF WRONGS TO PROPERTY.

A. Of Wrongs to Real Property.

Trespass is the wrongful and unwarrantable entry upon the soil or land of another person.

The essential to constitute trespass is therefore entry, which may be either actual or constructive.

Constructive entry may be roughly described as every interference with the land of another—*e.g.*, throwing rubbish or pouring water on your neighbour's land.

Neither force nor unlawful intention, nor actual damage, nor the breaking of an inclosure, is necessary to constitute a trespass.

Besides bringing an action for damages, the person whose land is trespassed upon may—

1. Forcibly defend his possession against a trespasser.
2. Forcibly eject him.

In neither case, however, must unnecessary violence be used.

To maintain an action for trespass, plaintiff must prove that at the time the wrong was committed he had either—

1. Title; or
2. Possession, which may be actual or constructive.

In English law, constructive possession means, either the possession of an agent or servant, or an immediate right to possess, or possession conferred by law in certain cases independently of any physical apprehension or transfer (*a*). By means of the doctrine of constructive possession the strictly possessory remedies were largely extended in favour of owners not themselves in actual possession.

The actual occupier of real property is always entitled to maintain an action for trespass thereon. On the other hand, the owner who has parted with possession in favour of a tenant or lessee, cannot maintain an action for trespass; he is, however, entitled to sue where an injury is done to his reversionary estate, provided that such injury is of a permanent nature, and deteriorates the marketable value of the property (*b*). In such cases the tenant is entitled to sue in respect of the immediate injury,

(*a*) *Smith v. Milles* (1786), 1 T. R. 480. See also Pollock, 5th ed. p. 320, note (*m*); and upon the whole of this difficult and complicated subject, see “An Essay on Possession in the Common Law,” by Sir Frederick Pollock and Mr. Justice Wright.

(*b*) *Tucker v. Newman* (1839), 11 A. & E. 40. This, under the old system of pleading, would have been an action on the case.

and the reversioner in respect of the diminished saleable value of the property.

The defences to an action for trespass are :—

1. On the ground of necessity, *e.g.*, to escape some pressing danger.
2. Leave and Licence, by implied invitation, as entering a shop or inn.
3. *Liberum tenementum*, that it is the defendant's land. This raises the question of title. Therefore the action of trespass is a convenient method for trying the question of title to lands.
4. By authority of law—*e.g.*, entry to serve legal process, or to distrain.
5. To re-take one's goods or cattle, but entry is not justified by the mere fact that defendant's goods or cattle are there. It must be shown that they came there by plaintiff's act, or that they had been stolen from defendant.
6. To abate a nuisance, after notice (c).
7. On the ground of some special property or easement.

Joint tenants, or tenants in common, can only sue one another in trespass when the act complained of is inconsistent with the complaining party's right—*e.g.*, carrying off the soil.

(c) See *infra*, p. 54.

By the statute 21 Jac. 1, c. 16, s. 3, actions for trespass must be brought within six years next after the cause of action arose.

Dispossession is wrongfully keeping possession of land from its rightful owner.

Former remedy—Action of ejectment.

Now by Jud. Act, 1873—Action to recover the land. Plaintiff must recover by the strength of his own title, not by the weakness of his adversary's, *e.g.*, mere possession is *primâ facie* evidence of title until the claimant makes out a better one; or the defendant may plead *jus tertii*—*i.e.*, the right of a third person—but the claimant cannot assert *jus tertii* in support of his claim, possession being a good title against all except the true owner.

By the Statutes of Limitation (*d*) no action lies for the recovery of land or rent, unless brought within twelve years after the right to maintain such action shall have accrued to the claimant, or to the person through whom he claims. Where, however, the claimant or any person through whom he claims has been deprived of such land or rent by the concealed fraud of the person in possession, or any person through whom he claims, the statute does not begin to run until “the time when such fraud shall or with reasonable diligence might have been first known or

(*d*) 3 & 4 Will. 4, c. 27, s. 2; and 37 & 38 Vict. c. 57, s. 1.

discovered" (e). Claimants under the disability of infancy, coverture, or unsound mind, may bring their action within six years after such disability has ceased. But in no case can any such action be brought after thirty years, except in the case of concealed fraud.

A lawful owner out of possession may peaceably enter, but must not use force. If he does so, though technically he cannot be liable for a trespass on his own land, the better opinion appears to be (though it is by no means free from doubt) that he will be liable for assault, and, in addition, a forcible entry of this kind is an offence against 5 Ric. 2, c. 18, s. 1 (f).

To make a man a trespasser *ab initio*, two things must always concur:—

1. There must be a misfeasance.
2. The rights infringed must be given by the law, and not by an individual.

In *The Six Carpenters' Case* (g), six carpenters entered a London tavern, ordered and paid for wine, then ordered more which they did not pay for. Was their original entry rendered tortious by this refusal? No;

(e) 3 & 4 Will. 4, c. 27, s. 26. See also *Gibbs v. Guild* (1882), 9 Q. B. D. 59.

(f) See Pollock, 5th ed. pp. 357—360; *Beddall v. Maitland* (1881), 17 Ch. D. 174; *Edwick v. Hawkes* (1881), 18 Ch. D. 199. As to what constitutes forcible entry, see *Jones v. Foley*, (1891) 1 Q. B. 730.

(g) 1 Sm. L. C., 10th ed., p. 127.

for such refusal was a mere non-feasance. Notice that the reason why misfeasance does not make a man a trespasser *ab initio* when the authority is conferred by an individual is that such authority can be limited or recalled at will, whereas rights given by law require to be more strictly protected.

According to the above rule, a misfeasance in distraining would make a landlord a trespasser *ab initio*, which would obviously work great hardship. Therefore a remedial statute, 11 Geo. 2, c. 19, s. 19, provides that where a distress is made for rent justly due, and an irregularity afterwards occurs on the landlord's part, the distress is not on that account to be deemed unlawful, nor the person making it a trespasser *ab initio*.

The words on notice boards, "Trespassers will be prosecuted," are, "if strictly construed, a wooden falsehood" (*h*), as trespass is not a crime, and were originally intended to secure costs under certain statutes, which provided that in actions for trespass, when less than 40s. was recovered, no more costs than damages should be allowed, unless the judge certified that the action was brought to try a right, or that the trespass was "wilful and malicious." Trespass after notice not to trespass on plaintiff's lands was held to be

(*h*) Maitland's "Justice and Police" (English Citizen Series), p. 13.

wilful and malicious, and special communication of such notice to defendant was not required (*i*).

Where a person has been injured on the land of another, his position with regard to the question whether he can maintain an action in respect of such injuries will depend upon whether, at the time of his sustaining such injury, he was—

1. A trespasser ;
2. A licensee ; or
3. A person coming on lawful business.

1. A trespasser cannot maintain an action where the “unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction” (*k*) ; *e.g.*, if he tumbles into a hole or unguarded pit, “he has no remedy for any injury suffered thereby, as the hurt is in such case caused by his own carelessness and misconduct” (*l*). On the other hand, he can maintain an action where the unlawful act or conduct on his own part is not so connected with the harm suffered by him as part of the same transaction ; *e.g.*, if, whilst he is trespassing, the owner of the land comes and knocks him down or assaults him without any provocation or excuse.

In *Ilott v. Wilkes* (*m*), it was held that a trespasser,

(*i*) *Bowyer v. Cook* (1847), 4 C. B. 236.

(*k*) Pollock, 5th ed. p. 170.

(*l*) Per Wilde, B., in *Boleh v. Smith* (1862), 7 H. & N. 736.

(*m*) (1820), 3 B. & Ald. 304 ; 22 R. R. 400.

with notice that spring-guns were set on the land he trespassed on, could not recover for injuries caused by such guns, on the ground that he voluntarily exposed himself to the mischief complained of. On the other hand, in *Bird v. Holbrook* (*n*), a trespasser wounded in similar circumstances, but without such notice, was held entitled to recover. In consequence of the former case, setting spring-guns, except by night in a dwelling-house for the protection thereof, was made a criminal offence by 7 & 8 Geo. 4, c. 18, now repealed and substantially re-enacted by 24 & 25 Vict. c. 95, s. 1, and c. 100, s. 31.

By the General Highway Act (5 & 6 Will. 4, c. 50), s. 70, it is illegal to sink a pit, or erect a steam or other like engine, gin or machinery attached thereto, within 25 yards of a carriage or cartway, unless concealed so as to prevent danger. The same Act also prohibits the erection of windmills within 50 yards, of furnaces within 15 yards, and letting off fireworks within 50 feet of a carriage or cartway. By the Quarries Fencing Act, 1887 (50 & 51 Vict. c. 19), s. 3, "where any quarry dangerous to the public is in open or unenclosed land, within 50 yards of a highway or place of public resort dedicated to the public, and is not separated therefrom by a secure and sufficient fence, it shall be kept

(*n*) (1828), 4 Bing. 628; 29 R. R. 657.

reasonably fenced for the prevention of accidents, and unless so kept shall be deemed to be a nuisance liable to be dealt with summarily in manner provided by the Public Health Act, 1875." And by the **Barbed Wire Act, 1893** (56 & 57 Vict. c. 32), s. 3 (1), "Where there is on any land adjoining a highway within the county or district of a local authority a fence made with barbed wire, or in or on which barbed wire has been placed, and such barbed wire is a nuisance to such highway, it shall be lawful for such local authority to serve notice in writing upon the occupier of such land requiring him within a time therein stated (not to be less than one month nor more than six months after the date of the notice) to abate such nuisance"; and by sect. 3 (2), "If on the expiration of the time stated in the notice the occupier shall have failed to comply therewith, it shall be lawful for the local authority to apply to a court of summary jurisdiction, and such court, if satisfied that the said barbed wire is a nuisance to such highway, may, by summary order, direct the occupier to abate such nuisance; and on his failure to comply with such order within a reasonable time, the local authority may do whatever may be necessary in execution of the order, and recover in a summary manner the expenses incurred in connection therewith."

2. A licensee, *i.e.*, a person to whom the owner of

certain property has given consent to do certain acts which, without passing any interest in the property, merely prevents such acts from being wrongful, can successfully maintain an action against his licensor, if the danger through which he sustained hurt was of a concealed character, which the licensor knew of and the licensee did not. In the words of Willes, J., in *Gautret v. Egerton* (o), there must be something equivalent to laying a trap for the unwary licensee.

In *Southcote v. Stanley* (p), plaintiff, guest of defendant, was leaving defendant's house when a pane of glass fell from the door and cut him. Held, upon above grounds, defendant was not liable.

3. Anyone who has entered upon premises on lawful business, in which the person having the control of such premises has an interest, and who has sustained injuries in consequence of such premises not being kept in a reasonably secure condition, is entitled to maintain an action for damages against such person.

In *Indermaur v. Dames* (q), plaintiff, in the employ of a gasfitter, went by appointment with defendant to see that certain gas apparatus fixed by his employer on defendant's premises acted properly. While there plaintiff fell down an unfenced shaft and was injured. Held, on above ground, defendant was liable.

(o) (1867), L. R. 2 C. P. 371.

(p) (1856), 1 H. & N. 247.

(q) (1866), L. R. 1 C. P. 274.

The same principle is illustrated in the cases of *Smith v. London and St. Katherine Docks Co.* (r) and *Heaven v. Pender* (s). In the former case, the defendants, a dock company, provided gangways from the shore to the ships lying in their dock, the gangways being made of materials belonging to the defendants and managed by their servants. The plaintiff went on board a ship in the dock at the invitation of one of the ship's officers, and, while he was on board, the defendants' servants, for the purposes of the business of the dock, moved the gangway, so that it was, to their knowledge, insecure. The plaintiff, in ignorance of its insecurity, was returning along it to the shore, when the gangway gave way and he was injured. Held, that there was a duty on the defendants towards the plaintiff to keep the gangway reasonably safe, and that he was entitled to recover damages from them for the injuries he received.

In *Heaven v. Pender* (s), plaintiff, a workman, was employed by A. to paint A.'s ship, lying in a dock. Defendant, the dock owner, provided staging for workmen's use. The staging, not being strong enough, broke, and plaintiff was injured. Held, defendant was liable, on the ground that persons having the control of buildings or other structures intended for human use and occupation are bound to

(r) (1868), 3 C. P. 326.

(s) (1883), 11 Q. B. D. 503.

keep them in a reasonably safe condition, and are liable for injuries caused by neglect of such duty to any person upon the spot, or engaged in work on or about the property whose condition is in question, in the course of any business in which the occupier has an interest.

In *O'Neill v. Everest* (*t*) the two last-mentioned cases were cited in the Court of Appeal on behalf of the plaintiff, but were distinguished on the ground that in both there was a concealed danger; in the one case the injury was caused by an insecure plank, in the other by a rotten rope. In the course of his judgment Lord Herschell, following the principle laid down in *Smith v. London and St. Katharine Docks Co.* (*u*), pointed out that, in order to succeed in an action of this kind, the plaintiff must prove a duty on the part of the defendant towards him to keep the premises in a reasonably secure condition, and, further, that the injury was the direct result of a breach by the defendant of such duty.

Persons sometimes have rights over the lands of others, entitling them to do acts which, if they had not such rights, would be trespasses. Of such rights the chief are easements and rights of common, a de-

(*t*) (1892), 61 L. J. Q. B. 453; 66 L. T. 396. See also *Miller v. Hancock*, (1893) 2 Q. B. 177 (C. A.); *Lane v. Cox*, (1897) 1 Q. B. 415.

(*u*) (1868), 3 C. P. 326.

tailed exposition of which would be out of place in this work ; but the following important points may be noticed :—

Rights of proprietors of land with regard to water flowing through or under their lands :

1. Natural streams running above ground, and subterranean streams the courses of which are well known and clearly defined.

Every riparian proprietor, *i.e.*, every person owning land adjoining a river, is deemed in law to own the soil up to the centre of the river, and if he interferes with it beyond that point he commits a trespass. Every proprietor of such adjoining land has, as a natural right incident to the right to the soil itself, a right to the reasonable use of the water ; what is a reasonable quantity of water depending on the circumstances of each case. In *Sandwich v. G. N. R. (v)*, the defendant company supplied their engines and station with water from the plaintiff's stream. Plaintiff, a millowner, sued for an injunction and compensation. Held, under all the circumstances of the case, as there was no damage caused in wet weather, and the working of the mill was never in any case shortened by more than a few minutes a day, the defendant company was not liable. The above rule is, however, subject to the provision that the adjoining proprietor must not thereby interfere with the

(v) (1878), 10 Ch. D. 707.

use of other proprietors either above or below him—*e.g.*, he must not foul the stream (*x*), though he may do so by grant or prescription (*y*). Every riparian proprietor has the right to have it come to him in its natural state in flow, quantity and quality, and to go from him without obstruction (*z*).

The law as to a subterranean stream, the course of which is well known and clearly defined, as in the case of the river Mole, is the same as laid down above with regard to natural streams flowing above ground (*a*).

2. Artificial watercourses, as to which the law depends upon whether they are of a permanent or temporary character, and upon the circumstances under which they were created. If an artificial stream is permanent in its character, a right to the uninterrupted flow of the water may be acquired by prescription or grant against both the originator of the stream, and also against any person over whose land the water flows (*b*); but long enjoyment of an artificial stream will not give a right to the unob-

(*x*) *Wood v. Waud* (1849), 3 Ex. 748.

(*y*) *Embry v. Owen* (1851), 6 Ex. 353.

(*z*) See judgments in *Chasemore v. Richards* (1859), 7 H. L. C. 349.

(*a*) Per Pollock, B., in *Dudden v. Guardians of Clutton Union* (1857), 1 H. & N. 630.

(*b*) *Sutcliffe v. Booth* (1863), 32 L. J. Q. B. 136; *Holker v. Forrit* (1873), L. R. 10 Ex. 59.

structed use of a stream obviously made for temporary purposes, as to drain a mine (c).

In *Greatrex v. Hayward* (d), plaintiff's land enjoyed for fifty years the benefit of artificial drains made by defendant, a neighbouring farmer, to drain his own lands. It was held that plaintiff could not prevent defendant from deepening the drain for purposes of cultivation, and thereby depriving plaintiff of water enjoyed for fifty years, as the drain was originally made for temporary purposes.

“From the judgment in *Arkwright v. Gell* (e), it will be seen, that the reason why a right to the uninterrupted flow of the water of an artificial stream cannot be acquired by prescription against the originator of the stream, if it is of a temporary character, is, that the temporary nature of the stream precludes a presumption of a grant of a permanent right; but the case is manifestly different if the stream is permanent, although artificial, for there can be no reason why a person who makes a permanent watercourse may not make a grant of right in perpetuity to use the water to any person through whose land the stream is made to flow; and, indeed, nothing is more likely than that an owner of land would stipulate,

(c) *Arkwright v. Gell* (1839), 5 M. & W. 203; *Wood v. Waud* (1849), 3 Ex. 748.

(d) (1853), 8 Ex. 291.

(e) (1839), 5 M. & W. at p. 227.

when such a watercourse is made, that he shall have the benefit and use of the water as it flows through his land. A presumption of such a grant, therefore, may be readily made, and it will receive the sanction of the law" (*f*).

3. Natural streams running underground in undefined courses and percolating water, the course of which is underground, undefined, and unknown.

There is no natural right to the uninterrupted flow of such streams (*g*), nor can such a right be acquired by prescription, for such a right, "founded upon length of enjoyment, is supposed to have originated in some grant; but what grant can be presumed in the case of percolating waters depending upon the quantity of rain falling, or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, if at all, the enjoyment would be affected by any water percolating in and out of the defendant's or any other land? . . . The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant, but how could a man prevent or stop the percolation of water?" (*h*). In *Chasemore v. Richards* (*i*),

(*f*) Goddard on Easements, 5th ed., pp. 324, 325.

(*g*) *Acton v. Blundell* (1843), 12 M. & W. 324.

(*h*) Per Wightman, J., in delivering the opinion of the judges to the House of Lords in *Chasemore v. Richards* (1859), 7 H. L. C. 370.
 (*i*) (1859), 7 H. L. C. 349.

A.'s mill was worked by a river, supplied by water produced by the rainfall over a large district. B. sunk a well on his own land, and pumped up water for the supply of Croydon, thereby preventing an enormous quantity of water from ever reaching the river or the mill. Held, A. had no right of action against B. Such a right may, however, be acquired by express grant (*k*).

A landowner, therefore, may collect or dispose of such water, regardless of his neighbour's interests; but—

1. He may not foul it; for, though he may appropriate it, until appropriation there is no property in it; and whilst it percolates every owner through whose land it passes has a right to receive it in its natural condition.

In *Ballard v. Tomlinson* (*l*), the plaintiff and defendant each possessed a well. The defendant turned sewage into his, whereby the plaintiff's became polluted. Held, by the Court of Appeal, unanimously reversing Pearson, J., in the Court below, that an action was maintainable.

2. He will be restrained from drawing off the subterranean water on the adjoining land, if in so doing he draws off water which has once flowed

(*k*) *Whitehead v. Parks* (1858), 2 H. & N. 870.

(*l*) (1835), 29 Ch. D. 115.

in a defined surface channel. “If you cannot get at the underground water without touching the water in a defined surface channel, you cannot get at it at all.” Per Hatherley, L. C., in *Grand Junction Canal Co. v. Shugar* (m); thus distinguishing it from *Chasemore v. Richards* (n), where, likewise, the water in the river was diminished, but was diminished by preventing the subterranean water from ever reaching it, not (as in *The Grand Junction Canal Co. v. Shugar*) by drawing water away from the river itself.

Every person commits a tort who so uses his own land as to damage his neighbour by depriving him of the subjacent or adjacent support necessary to retain such neighbour's land in its natural and unencumbered state(o).

Notice carefully that this right to the support of the subjacent soil or of the adjacent land exists **only in favour of land unweighted by buildings**, *i.e.*, in favour of land in its natural state; and, further, that no action lies without proof of appreciable damage.

In *Smith v. Thackerah* (p), defendant dug a well, which caused plaintiff's adjacent land to sink, and a

(m) (1871), L. R. 6 Ch. App. 488.

(n) *Supra*, pp. 57, 58.

(o) *Backhouse v. Bonomi* (1861), 9 H. L. C. 503; *Humphries v. Brogden* (1850), 12 Q. B. 739.

(p) (1866), L. R. 1 C. P. 564.

building, erected thereon within twenty years, to fall. It was proved that if the building had not been on plaintiff's land the land would still have sunk, but the damage to plaintiff would have been inappreciable. Held, that no action lay.

But the right to support of land weighted by buildings may be acquired—

(1) By grant, which may be—

a. Express; or

b. Implied, *e.g.*, as in *Rigby v. Bennett* (*q*), where a man granted part of his land for building.

(2) By prescription.

The rule laid down in the famous case of *Angus v. Dalton* (*r*) is, that a right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time; and that it is so acquired if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building.

In *Lemaitre v. Davis* (*s*), Hall, V.-C., held that the owner of buildings can acquire by prescription, as

(*q*) (1882), 21 Ch. D. 559.

(*r*) (1881), 6 App. Ca. 740.

(*s*) (1882), 19 Ch. D. 281.

an easement within 2 & 3 Will. 4, c. 71, s. 2, a right to support from the buildings of the adjoining owner. But where buildings are not adjoining, no right of support can be so acquired. In *Solomon v. Vintners' Co.* (t), three contiguous houses in a street leaned out of the perpendicular for thirty years, A.'s leaning on B.'s, B.'s on C.'s. C. removed his, and the rest fell. In an action by A., it was held that he had no right to have his house supported by C.'s through the intervening house.

The right to support referred to in these different cases is quite independent of any question of negligence. A man is, of course, always responsible to his neighbour for carrying out works on his own land in a negligent and improper way (u).

“Waste is any unauthorized act of a tenant for a freehold estate not of inheritance, or for any lesser interest, which tends to the destruction of the tenement or otherwise to the injury of the inheritance” (x). Such injury may be loss of market value, or an alteration throwing doubt on the identification of the property, and thereby impairing the evidence of title (y).

(t) (1860), 4 H. & N. 585.

(u) See *Bower v. Peate* (1876), 1 Q. B. D. 321; and *Hughes v. Percival* (1883), 8 App. Cas. 443, *supra*, p. 29.

(x) Pollock, 5th ed. p. 327.

(y) Per Jessel, M. R., in *Jones v. Chappell* (1875), 20 Eq. 539; *Meux v. Cobley*, (1892) 2 Ch. 253.

Voluntary waste is where the waste consists in the active doing of something, *e.g.*, pulling down a house.

Permissive waste is a mere passive act, *e.g.*, allowing a house to go to rack and ruin by reason of non-repair.

Legal waste is a term used to describe waste for which there lay a remedy *at law*,—equitable waste, waste which was only recognized as such and relieved against *in equity*. If an estate were given to a limited owner without impeachment for waste, at law he could commit what waste he chose, but equity would interfere to prevent his pulling down the mansion-house or cutting ornamental timber; and these acts were called equitable waste. As regards the remedy in this case, the **Judicature Act, 1873** (36 & 37 Vict. c. 66), has abolished the distinction. By sect. 25 (3) of that Act, “an estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.”

The general rule is that tenants for life, for years, at will, and at sufferance, are liable for waste. This is, however, subject to the qualification that, in the absence of an express covenant or an obliga-

tion not to commit waste imposed by the instrument creating the estate (*z*), neither a tenant for life (*a*), nor a tenant at will (*b*), is liable for permissive waste (*c*).

A tenant in fee simple, of course, is not liable for waste; nor is a tenant in tail, because he can at any time bar the entail, and make himself tenant in fee simple; but a tenant in tail, after possibility of issue extinct, is liable for equitable waste, inasmuch as he cannot bar the entail.

Nuisance is "the wrong done to a man by unlawfully disturbing him in the enjoyment of his property, or in some cases in the exercise of a common right" (*d*); it is either—

1. Public, *i.e.*, an act affecting the public at large, or some considerable portion of them.
Remedy—indictment or information.

(*z*) *Woodhouse v. Walker* (1880), 5 Q. B. D. 504.

(*a*) *Powys v. Blagrove* (1854), 4 De G. M. & G. 448; *Barnes v. Dowling* (1881), 44 L. T. N. S. 809; *In re Cartwright, Avis v. Newman* (1889), 41 Ch. D. 532.

(*b*) *Gibson v. Wells* (1805), 1 B. & P. N. R. 290; 8 R. R. 801; *Harnett v. Maitland* (1847), 16 M. & W. 257.

(*c*) On the other hand, in *Davies v. Davies* (1888), it was held by Kekewich, J., that a tenant for years is liable for permissive waste, but it may be respectfully doubted whether this decision would be upheld in a higher Court. See *Barnes v. Dowling, supra*; and the observations of Kay, J., in *In re Cartwright, Avis v. Newman* (1889), 41 Ch. D. at p. 535.

(*d*) Pollock, 5th ed. p. 374.

2. **Private**, *i. e.*, an act affecting some particular individual or individuals, as distinguished from the public at large. Remedy—action for damages or an injunction, or both; also **abatement**, *i. e.*, removal of the nuisance by the party injured, which removal must be (1) peaceable; (2) without danger to life or limb; and (3) (if it is necessary to enter another's land to abate the nuisance, or where the nuisance is a dwelling-house in actual occupation on a common (*e*),) after notice to remove the same, unless it is unsafe to wait. These three remedies are confined to private nuisances, but in one case they are applicable to public nuisances, namely, where the act complained of more prejudicially and injuriously affects some particular individual or individuals than the public at large. In *Soltan v. De Held* (*f*), plaintiff resided in a house next to a Roman Catholic chapel, of which defendant was priest. The chapel bell was rung at all hours, day and night. Though the ringing was a public nuisance, it was held, on the above ground, that plaintiff was entitled to an injunction.

(*e*) *Perry v. Fitzhove* (1845), 8 Q. B. 757; 15 L. J. Q. B. 239.

(*f*) (1851), 2 Sim. N. S. 311.

Nuisances are also—

1. Those causing damage to property, for which substantial compensation can always be obtained. In *St. Helens Smelting Co. v. Tipping (g)*, the fumes from the company's works killed the plaintiff's shrubs. Held, sufficient cause of action for nuisance against company.
2. Those causing personal discomfort. It is necessary to show material and continuous interference with "the physical comfort of human existence," according to an ordinary reasonable standard; thus it was held in a recent case that temporary annoyance caused by the execution of lawful works does not amount to a nuisance (*h*).

Where a nuisance is caused by the non-repair of premises, the occupier of such premises is *prima facie* liable (*i*); but the landlord is liable (1) if he has authorized the continuance of the nuisance (and it seems that merely letting the premises in a ruinous condition does *not* constitute such an authorization) (*k*), or (2) if by the terms of the

(*g*) (1865), 11 H. L. C. 650.

(*h*) *Harrison v. Southwark and Vauxhall Water Co.*, (1891) 2 Ch. 409.

(*i*) *Tarry v. Ashton* (1876), 1 Q. B. D. 314.

(*k*) *Pretty v. Bickmore* (1873), L. R. 8 C. P. 401; *Gwinnell v. Eamer* (1875), 10 C. P. 658.

lease he is bound to repair (*l*), but not otherwise (*m*).

It is no defence to an indictment for nuisance to show that the act complained of is in some other way beneficial to the public. Thus, before tramways were authorized by statute, *Reg. v. Train* (*n*) decided that to lay down a tramway in a public street, thereby obstructing the ordinary traffic, was an indictable nuisance at common law, though the number of persons using the tram cars, and so saving time and money, was much greater in number than those who were obstructed.

It is no defence that plaintiff himself came to the nuisance (*o*), or that the trade or business causing annoyance is otherwise harmless, or even in itself necessary and praiseworthy. Thus, as was said in *Jones v. Powell* (*p*), "a tan-house is necessary, for all men wear shoes; nevertheless it may be pulled down if it be erected to the nuisance of another. In like manner of a glass-house; and they ought to be erected in places convenient for them."

Beware of the misleading phrase, "rights to light and air." Right to light is one thing; right to air is

(*l*) *Todd v. Flight* (1860), 9 C. B. N. S. 377.

(*m*) See *Pretty v. Bickmore*, and *Gwinnell v. Eamer*, *supra*; also *Nelson v. Liverpool Brewery Co.* (1877), 2 C. P. D. 311.

(*n*) (1862), 2 B. & S. 640.

(*o*) *St. Helens Smelting Co. v. Tipping*, *supra*, p. 65.

(*p*) (1628), Palm. at p. 539.

another. There is no such right known to the law as the specific right to the access of air over a neighbour's land. In *Webb v. Bird* (*q*), it was held that the owner of a windmill cannot, under sect. 2 of the Prescription Act (2 & 3 Will. 4, c. 71), prevent the owner of adjoining land from building so as to interrupt the passage of air to the mill, though the mill has been worked by this air for over twenty years. In *Bryant v. Lefevre* (*r*), it was held that the access of air to chimneys cannot, as against the occupier of neighbouring land, be claimed (1) as a natural right of property, or (2) as an easement, by prescription from the time of legal memory, or (3) by a lost grant, or (4) under the Prescription Act, 1832. See also *Harris v. De Pinna* (*s*).

An action, however, lies where the stoppage of air is injurious to health (*t*).

Right to light is not a natural right incident to the ownership of windows, but an easement, to which title must be shown—

1. By grant, express or implied, *e.g.*, where, as in *Palmer v. Fletcher* (*u*), a man grants a house in which there are windows, neither

(*q*) (1862), Ex. Ch. 13 C. B. N. S. 841.

(*r*) (1879), 4 C. P. D. 172.

(*s*) (1886), 54 L. T. N. S. 38.

(*t*) *City of London Brewery Co. v. Tennant* (1873), L. R. 9 Ch. App. 221.

(*u*) (1664), 1 Sid. 167, 207.

he nor anyone claiming under him can stop up the windows or destroy the lights; or

2. By prescription at common law; or

3. By prescription under the Prescription Act (2 & 3 Will. 4, c. 71, s. 3), by which twenty years' use, unless by written consent, gives the right. By sect. 4 nothing is to be deemed an interruption unless submitted to for a year after notice. Therefore, in *Flight v. Thomas* (x), where there had been an enjoyment for nineteen years and 330 days, followed by an interruption of thirty-five days just before action, it was held that such an enjoyment was sufficient to establish the right.

An owner of ancient lights is entitled not only to sufficient light for his present business, but to all the light enjoyed previously to the interruption sought to be restrained; *i.e.*, to succeed, defendants must show that for whatever purpose plaintiffs might wish to employ the light, there would be no material interference with it. In *Yates v. Jack* (y), a merchant's warehouse had its lights blocked by a building opposite, and the defendant's plea, that enough light was still left for his *business* purposes, was held bad.

If a person opens new lights, these may be ob-

(x) (1840), 11 A. & E. 688.

(y) (1866), L. R. 1 Ch. 295.

structed with impunity; but an existing right to light is not lost by interruption which is not continuous in time and quantity (*z*), or by a subsequent intermission of enjoyment not amounting to intentional abandonment, or by enlarging, rebuilding, or altering the window for which access of light is claimed (*a*), so long as the ancient lights, or a material part thereof, remain substantially capable of continuous enjoyment. It is not necessary that the structural identity of the old windows be preserved (*e.g.*, a house may be pulled down and rebuilt (*b*)), but the plaintiff must give evidence as to the *position* of the ancient lights (*c*).

B. Of Wrongs to Personal Property.

Trespass to goods is the wrongful meddling by a person with the goods of another, either by removing them, or by otherwise dealing with them.

Conversion is the removal of goods from the possession of another with the design of depriving that other of them, or of exercising some dominion or control over them for his own benefit, or the benefit of some third person.

(*z*) *Presland v. Bingham* (1889), 41 Ch. D. 268.

(*a*) *Tapling v. Jones* (1865), 11 H. L. C. 290; *Ecclesiastical Commissioners v. Kino* (1880), 14 Ch. D. 213; *Greenwood v. Hornsey* (1886), 33 Ch. D. 471.

(*b*) *Scott v. Pape* (1886), 31 Ch. D. 554.

(*c*) *Fowlers v. Walker* (1882), 51 L. J. Ch. 443.

It is important to notice the fundamental distinction between these two wrongs. Trespass is essentially a wrong to the actual possessor, and therefore cannot be committed by a person in possession (*d*) ; conversion, on the other hand, is a wrong to the person entitled to immediate possession. The actual possessor is frequently, but not always, the person entitled to immediate possession, so that conversion may, but does not necessarily, include trespass.

An action for trespass lies against A. by B. when A. takes goods from the possession of B. This is so even though B. is not the true owner ; provided B.'s possession is (1) either actual or constructive (*e*), and (2) rightful as regards A. In other words, bare possession is generally a sufficient title as against a wrongdoer. In *Armory v. Delamirie* (*f*), a chimney-sweep found a jewel. He inquired its value of a jeweller, who, under a pretence of weighing it, took out the stone and then offered him three halfpence for it, and on the offer being declined refused to give it up. Held (1) the finder has a property against all but the true owner ; (2) on non-production, the

(*d*) *Johnson v. Diprose*, (1893) 1 Q. B. 512.

(*e*) See p. 42, *supra*.

(*f*) (1722), 1 Sm. L. C. 10th ed. 343. See also *Bridges v. Hawkesworth* (1851), 21 L. J. Q. B. 75 ; and *South Staffordshire Water Co. v. Sharman*, (1896) 2 Q. B. 44 ; and the discussion of these cases in Clerk and Lindsell on Torts, 2nd ed. p. 686 a.

jewels must be considered to be of the finest water, for *omnia præsumuntur contra spoliatores*.

In the case of conversion, "the grievance is, the unauthorized assumption of the powers of the true owner" (g). It is conversion none the less, though the wrongdoer only deals with the goods *as owner* for a very short time, and for a very limited purpose. It is no excuse that the defendant was acting under a mistaken, although an honest, and even reasonable, supposition of being lawfully entitled. Refusal to deliver on demand is evidence, but evidence only, of conversion, as there are cases (*e.g.*, the case of a servant in possession) where delay is justifiable.

Is a person liable for conversion if he *bonâ fide* deals with goods at the request of the apparent owner? He is not liable if he deals with (*contra*, if he assumes to dispose of) goods as the servant or agent of an apparent owner in actual possession (or under a contract with such apparent owner) according to the apparent owner's direction; provided (1) the act done (or the contract) does not purport to involve a transfer of the supposed property in the goods, and (2) the ostensible owner's direction is one which he could lawfully give if he were the true owner, and (3) which is obeyed in the honest belief that he is (h). See *Hol-*

(g) Pollock, 5th ed. p. 332.

(h) Pollock, 5th ed. pp. 335—337.

lins v. Fowler (i) (especially Lord Blackburn's observations (k)), where the defendants were held liable in conversion, because they exercised a real and effective, though transitory, dominion—they assumed to dispose of the goods. Applying the above rule, if A. steals corn, and takes it to a miller to be ground and returned to him, the miller is not liable in conversion; but if A. tells his servant B. to sell the stolen corn to C., and B. does so, B. is liable in conversion, even though he believes that the corn belongs to his master, A. This principle has been recently applied so as to render an auctioneer liable for selling goods in the ordinary course of his business, although he had no notice of the apparent owner's want of title (l).

If a bailee who has an interest, but a special and limited one, in the goods the subject of the bailment (*e.g.*, in case of hire or pledge), under cover of such interest deals with the goods in excess of his rights, he is only liable in conversion if his acts are wholly inconsistent with the contract under which he had the limited interest, as, *e.g.*, if a hirer sells or destroys the goods hired (m).

The general rule is, that no one can acquire a title

(i) (1875), L. R. 7 H. L. 757.

(k) *Ibid.* pp. 768—788.

(l) *Consolidated Co. v. Curtis*, (1892) 1 Q. B. 495.

(m) *Cooper v. Willomatt* (1845), 1 C. B. 672; 14 L. J. C. P. 219.

to a chattel personal from a person who has himself no title to it; but this has no application to—

1. A person who bona fide, and for valuable consideration, receives a negotiable instrument—*e.g.*, a bill of exchange or a promissory note—such person being entitled to recover upon it, even though it has been stolen or fraudulently obtained by the person from whom he received it.

In *Miller v. Race* (*n*), plaintiff was a *bonâ fide* holder for valuable consideration of a note stolen from a mail-bag by highway robbers. On presentation, the bank clerk refused to cash, or even to return, it. Held, plaintiff was entitled to recover on the note.

If the instrument is not negotiable, *e.g.*, payable to order, and not indorsed, the thief or finder cannot pass any title to it by forging the indorsement, except, indeed, as against himself (*o*); nor in the case of a cheque crossed “not negotiable” can a person pass any better title than he has himself (*p*).

2. Sale in market overt, provided that the purchaser buys the goods in good faith and without notice of any defect or want of title on the part of the seller—by the Sale of Goods Act, 1893 (56 & 57

(*n*) (1758), 1 Bur. 452.

(*o*) 45 & 46 Vict. c. 61, s. 24.

(*p*) *Ibid.* s. 81.

Vict. c. 71), s. 22. If, however, the goods have been stolen and the thief is prosecuted to conviction, the property in the goods reverts in the original owner by virtue of sect. 24 of the same statute.

Sale in market overt is sale in open market, as opposed to sale in private, and means—(1) in the City of London (and other towns, when warranted by custom), sale in an open shop of goods usually sold in such shop (*q*) ; (2) in the country, and elsewhere, sale in the market-place, or on the piece of ground customarily used for the sale of goods.

The effect of sects. 22, 23, and 24 of the Sale of Goods Act, 1893 (*r*), would seem to be that where the seller of goods has obtained them in such a way that he has no title at all, the *bonâ fide* purchaser can acquire no title to them except by buying them in market overt, and that even in that case, if the goods have been stolen, the *bonâ fide* purchaser will lose his title as against the original owner upon conviction of the thief ; if, however, the seller, at the time of selling the goods, had a title which was voidable, but which had not then been avoided, *e. g.*, if he had obtained them by means of a contract induced by

(*q*) *Hargreave v. Spink & Son* (1891), 65 L. T. N. S. 650.

(*r*) The above sections reintroduce the law as it existed prior to 24 & 25 Vict. c. 96, s. 100, and the case of *Bentley v. Vilmont* (1887), 12 App. Cas. 471, is therefore no longer law.

fraud, the *bonâ fide* purchaser acquires a good title to the goods of which he cannot in any way be divested.

Where horses are stolen, and are then sold in market overt to a *bonâ fide* purchaser for value, even then the property does not pass, unless certain formalities required by statutes of Mary and Elizabeth (s) are complied with, viz.—

- (1) The horse must be exposed in open market for one hour between 10 a.m. and sunset;
- (2) A minute description of buyer, seller, horse and terms of contract, must be entered in the book-keeper's book;

and even then, if the horse has been *stolen*, the rightful owner can recover it within six months of the sale by tendering to the person possessed of it the price paid by such person.

No writ of execution against goods affects the title to such goods acquired by any person *bonâ fide* and for valuable consideration before actual seizure under such writ; provided that the purchaser had not, at the time when he acquired the title, notice that such a writ had been issued (t).

Recaption is the re-taking by a lawful owner of goods of which he has been wrongfully deprived. He may re-take them wherever he may find them,

(s) 2 & 3 P. & M. c. 7, and 31 Eliz. c. 12.

(t) 56 & 57 Vict. c. 71, s. 26.

provided he does not do so riotously, or by committing a breach of the peace.

In Trespass or Conversion who is entitled to sue?
Generally the person possessed of the goods at the time of the wrongdoing; but in bailment, the bailor may sue for an injury of a permanent nature (*e. g.*, if goods are destroyed or permanently damaged), and the bailee may sue for the direct loss to him.

Remedies :—

1. Formerly, for direct trespass there lay the action of trespass for damages for the direct injury done; and for injury indirectly resulting from the trespass there lay the so-called action of trespass on the case.

Now, the proper remedy for trespass to goods is an action for damages.

2. Formerly, for conversion there lay the action of trover (based on the assumption, generally a fiction, that defendant had found the goods in question) for the value (not for the return) of the goods.

Now, for conversion an action lies for the value of the goods.

3. Formerly, for wrongful detention of goods there lay the action of detinue, which was an action for damages for wrongful detention *or* for the return of the goods. Defendant, on an adverse verdict, could return the goods

or pay their value ; but by the **Com. Law Proc. Act, 1854**, plaintiff might apply to the court to order the return of the goods, without giving defendant the option of retaining them on payment of their value.

Inasmuch as the distinction between forms of action was abolished by the Judicature Acts, therefore, in point of form, the actions of—

Trespass to recover damages for interference with goods,

Trover to recover the value of goods for wrongful conversion thereof,

Detinue to recover damages *or* the return of goods for wrongful detention thereof,

no longer exist.

Action of replevin.—The owner of goods unlawfully distrained, seized under colour of distress or otherwise, can obtain the replevying—*i.e.*, the return of such goods—on giving security to the registrar of the District County Court to prosecute an action of replevin against the seizer without delay, and to return the goods if a return should be adjudged. The action must be commenced within one month in the District County Court (*u*), or within one week in the High Court. In the latter case, unless judgment be obtained by default, the plaintiff must prove that he

(*u*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 136.

had good ground for believing either that the title to some hereditament, the yearly rent or value whereof exceeded 20*l.*, or to some toll, market, fair, or franchise was in question, or that the rent or damage subject of the distress, or the value of the goods seized, exceeded 20*l.* (*x*).

A patent is a privilege given by the Crown to the inventor of any new manufacture of general utility for fourteen years, or less, to make and vend it exclusively on condition of filing a specification—*i.e.*, a complete description of the invention, so that any ordinarily skilful person can use it at the end of the term.

Copyright is the sole and exclusive right of multiplying copies of an original work or composition which exists in its author, or his assigns, for the author's natural life, and seven years from his death, or forty-two years, whichever period is longer. (5 & 6 Vict. c. 45, s. 3.) Copyright of an article written for an encyclopædia, and paid for by the proprietor, is in him, but after twenty-eight years reverts to the author, or his representatives. Right to property in copyright must be registered at Stationers' Hall, and is assignable by entry of transfer there. If, however, the author omits to register, his copyright is unaffected, but he cannot sue for an infringement.

(*x*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 135.

No copyright exists in—

1. An advertisement.
2. An analysis of the work of some other person.
3. Immoral or libellous works.

A trade-mark is a symbol of identification of goods, and must consist of a name, signature, distinctive device, or fancy word not in common use; to these may be added any letters, words, or figures.

The property in a trade-mark is the exclusive right to the use of the mark as applied to a particular manufacture, but there is no right to the abstract ownership of any mark—*e.g.*, an ironfounder, who uses a mark for iron manufactures, cannot restrain the use of the same mark on other goods.

CHAPTER VI.

OF LOSS OF SERVICE AND SEDUCTION.

EVERY person who knowingly and designedly interrupts the relation subsisting between master and servant (1) by procuring the servant to depart from the master's service, or (2) by harbouring and keeping him as servant after he has quitted his place and during the stipulated period of service, whereby his master is injured, commits a wrongful act, for which he is responsible in damages (a). In *Lumley v. Gye* (b), plaintiff, the manager of a theatre, sued defendant, a rival manager, for inducing a third party to break an engagement to sing at plaintiff's theatre. Held, plaintiff entitled to recover.

Prior to *Lumley v. Gye*, it used to be thought (1) As Coleridge, J., held, in his dissenting judgment, that such an action only lay where the strict relationship of master and servant was proved. *Bowen v. Hall* (c) confirmed *Lumley v. Gye*, Coleridge, L. C. J.,

(a) See judgment of Crompton, J., in *Lumley v. Gye* (1853), 2 E. & B. 216; 22 L. J. Q. B. 463.

(b) (1853), 2 E. & B. 216.

(c) (1881), 6 Q. B. D. 333.

dissenting on the same grounds as Coleridge, J., had done before him. (2) The damage sued for must have been the legal consequence of defendant's act (*d*). Thus, if A. slander B. to a mob, who, in consequence, throw B. into a horse-pond, according to this view B. could not recover for such damage as against A. But *Lumley v. Gye* alters this rule, and allows the wrongful act of a third party to form part of the damage, if such act would naturally arise from defendant's conduct.

It is now, therefore, clear law that an action will lie for maliciously inducing a third party to commit a breach of his contract with the plaintiff, and that this is equally true whether the relationship of master and servant exists between the plaintiff and the third party or not (*e*).

On the other hand, it has been recently held by the House of Lords, in the important case of *Allen v. Flood* (*f*), that where the defendant does not induce the third party to commit a breach of his contract with the plaintiff, but merely induces such third party not to enter into a contract with the plaintiff, or not to employ the plaintiff, or to lawfully put an end to his contract with the plaintiff (whether such contract

(*d*) See *Vicars v. Wilcocks* (1806), 8 East, 1; 9 R. R. 361.

(*e*) *Bowen v. Hall* (1881), 6 Q. B. D. 333; *Temperton v. Russell and others*, (1893) 1 Q. B. 715.

(*f*) (1898) App. Cas. 1.

be one of personal service or not), no action will lie even though the defendant was actuated by an improper motive or ill-will towards the plaintiff.

Action of Seduction.—This is usually based on a fiction. The plaintiff, though as a rule he is not the master of the girl seduced, is supposed to be so, and to have lost the benefit of her services by the wrongful act of the defendant. He need not prove an express contract of service. If he is the father, and his child is under age, and not in actual service with another, service is presumed. “It is sufficient that the daughter was living with her father, forming part of his family, and liable to his control and command. The right to the service is sufficient” (g).

If he is not the father, or his child is not under age, provided she be living under plaintiff's roof, service will be presumed from slight acts of household duty, *e.g.*, milking cows or making tea (h).

The relationship of master and servant must have existed—

1. At the time of seduction; and
2. At the time of illness and loss of service.

In *Davies v. Williams* (i), where a girl was seduced

(g) Per Littledale, J., in *Maunder v. Venn* (1829), Moo. & Mal. 323; 31 R. R. 734.

(h) Per Butler, J., in *Bennett v. Alcott* (1787), 2 T. R. at p. 168.

(i) (1848), 10 Q. B. 725.

while in the service of one master, and became pregnant during her service with another, it was held that the seducer was not liable.

If plaintiff has encouraged profligate persons, or otherwise caused his own injury, he has no ground of action (*k*).

The damages are exemplary or vindictive, *i.e.*, not merely for the actual damage sustained, but for the anxiety, distress, loss of society and comfort suffered by the plaintiff, and for the dishonour brought upon him (*l*).

Though no action for seduction lies against a master for seducing his servant, yet this exemption will not cover the case of mere colourable hiring for the express purpose of seduction (*m*).

(*k*) *Reddie v. Scoolt* (1794), 1 Peake, 316.

(*l*) Per Lord Eldon, in *Bedford v. McKowl* (1800), 3 Esp. at p. 120.

(*m*) *Speight v. Olivier* (1819), 2 Stark. 493; 20 R. R. 728.

CHAPTER VII.

OF LIBEL AND SLANDER (*a*).

A defamatory statement is a statement concerning any person which exposes him to hatred, ridicule, or contempt, or which causes him to be shunned or avoided, or which has a tendency to injure him in his office, profession, or trade. Such statement, if in writing, printing, or other permanent form, constitutes a libel; if in spoken words or significant gestures, a slander.

The distinction between libel and slander carries with it many important consequences. Thus, libel is both a civil wrong and a criminal offence. On the other hand, slander is a civil wrong only, though the words may happen to come within the criminal law as being blasphemous, seditious, or obscene, or as being a solicitation to commit a crime, or as being a contempt of court. Again, where a defamatory statement is written or printed, the law

(*a*) This chapter is mainly taken from the Author's "Principles and Practice of the Law of Libel and Slander," 2nd edition, William Clowes and Sons, Limited, London, 1897.

presumes that of necessity the person defamed has suffered damage, and in the absence of legal justification or excuse, the publication of such a statement is wrongful. On the other hand, spoken words are actionable only when they produce, as a natural consequence, the loss of some definite temporal advantage, or, as it is called, special damage, or when they impute to the defamed person charges of a certain kind (*b*).

It is sometimes said that libel can be distinguished from slander by the fact that the former is addressed to the eye, the latter to the ear. This is, no doubt, true as a general rule, but there appears to be at least one exception to it—the case of a defamatory statement communicated by significant gestures—*e.g.*, the finger language of the deaf and dumb. Such a case, so far as the author is aware, has never arisen, but it is submitted that it would be governed by the same rules as spoken words, and would therefore come under the description of slander. The real distinction is, that in the case of libel the defamatory matter is in some permanent form; and usually, though not necessarily, in writing or printing. For instance, a statue (*c*), caricature (*d*), effigy (*e*), chalk

(*b*) See p. 96, *infra*.

(*c*) Hawkins, Pleas of the Crown, 8th ed. vol. i. p. 542.

(*d*) *Austin v. Culpepper* (1684), 2 Show. 313.

(*e*) 5 Rep. 125; *Monson v. Tussauds, Limited*, (1894) 1 Q. B. 671.

marks on a wall (*f*), "signs or pictures, as by fixing up a gallows on a man's door, or painting him in a shameful and ignominious manner" (*g*), may constitute a libel. Slander, on the other hand, is in its nature transient, and is always in the form of spoken words or significant gestures.

In order to be defamatory the words must refer to some particular individual, and the plaintiff must prove that he is that particular individual. In other words, there must be a definite imputation on a definite person. "If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual" (*h*). And, provided that the plaintiff can satisfy the jury that he was especially referred to, it is sufficient (*i*), whether the words complained of describe him by his own name, or its initial letter (*k*), or by asterisks (*l*), or by a fictitious name (*m*), or by the name of somebody else (*n*), or merely refer to a definite body of persons of which he is a member; for

(*f*) *Tarpley v. Blabey* (1836), 7 C. & P. 295.

(*g*) *Eyre v. Garlick* (1878), 42 J. P. 68.

(*h*) Per Willes, J., in *Eastwood v. Holmes* (1858), 1 F. & F. 349.

(*i*) *Lawrence v. Newberry* (1891), 64 L. T. 797.

(*k*) *Roach v. Garvan* (1742), 2 Atk. 469; *O'Brien v. Clement* (1846), 15 M. & W. 435.

(*l*) *Bourke v. Warren* (1826), 2 C. & P. 307.

(*m*) *Rex v. Clerk* (1729), 1 Barn. 304.

(*n*) *Levi v. Milne* (1827), 4 Bing. 195.

“if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done, as would be done if his name and Christian name were ten times repeated” (o).

But where it is uncertain whether the plaintiff was the particular individual aimed at, no action lies; *e.g.*, where, after the trial of an action at which there were three witnesses, the defendant said, “One of you three is perjured,” it was held that no action lay, as there was nothing to show that the plaintiff was the particular witness referred to (p).

Further, the words complained of must concern the plaintiff himself. They must affect his character or touch him in the way of his profession or trade. If they are directed solely at the plaintiff’s goods or his title to property, though an action may lie therefor, it is not an action of libel or slander, but “an action on the case for special damage sustained by reason of the speaking or publication” (q). In some cases, however, an attack on a man’s title to property or goods may also injuriously affect his reputation. Thus, it is libellous to write and publish of a book-

(o) Per Lord Campbell, C. J., in *Le Fanu and others v. Malcolmson* (1848), 1 H. L. C. 668.

(p) *Sir John Bourne’s case*, cited Cro. Eliz. 497; see also *James v. Redditch* (1599), 4 Rep. 17.

(q) Per Tindal, C. J., in *Malachy v. Soper* (1836), 3 Bing. N. C. 371; and see pp. 128, 129, *infra*.

seller that he sells immoral poems (*r*) ; and to say of a wine-merchant that his wine is poisoned, or of a tea-dealer that his tea is made green by drying it on copper, is a slander upon him in the way of his trade (*s*).

The matter complained of must be of a disparaging nature. Thus, it has been held libellous to write of a man that he is a man of straw (*t*), a hypocrite (*u*), a rascal (*x*), an impostor (*y*), that he is dishonest (*z*), ungrateful (*a*), impecunious (*t*), insane (*b*), and even, in one case, that his conduct had been unfeeling (*c*). So, too, ironical praise may amount to a libel (*d*) ; and it has been held libellous to publish in a newspaper a story in which the plaintiff is made to appear ridiculous, even though he has told it himself in the first instance (*e*).

On the other hand, it has been held **not libellous** to write of a man that he endeavoured to discourage

(*r*) *Tabart v. Tipper* (1808), 1 Camp. 350 ; 10 R. R. 698.

(*s*) Per Coltman, J., in *Ingram v. Lawson* (1840), 6 Bing. N. C. at p. 216.

(*t*) *Eaton v. Johns* (1842), 1 Dowl. N. S. 602.

(*u*) *Thorley v. Lord Kerry* (1812), 4 Taunt. 355 ; 13 R. R. 626.

(*x*) *Villers v. Monsley* (1769), 2 Wils. 403.

(*y*) *Campbell v. Spottiswoode* (1863), 3 B. & S. 769.

(*z*) *Austin v. Culpepper* (1684), Skin. 123.

(*a*) *Cox v. Lee* (1869), 4 Ex. 284.

(*b*) *Morgan v. Lingen* (1863), 8 L. T. 800.

(*c*) *Churchill v. Hunt* (1819), 2 B. & Ald. 685 ; 22 R. R. 807.

(*d*) *Boydell v. Jones* (1838), 4 M. & W. 446.

(*e*) *Cook v. Ward* (1830), 6 Bing. 409 ; 31 R. R. 456.

sedition in Ireland, for this would not injure him in the opinion of good citizens and respectable people (*f*); or that he sued his mother-in-law in a county court, for he may have properly done so (*g*); or that he owes money, for this does not imply that he cannot pay his debtors (*h*); or that he is "Man Friday" (*i*), "for the man Friday, as we all know, was a respectable man, although a black man" (*k*).

In order to determine whether a statement is defamatory it must be construed in its natural and ordinary meaning; if not defamatory in such meaning it must be construed in the special meaning, if any, in which it was understood by the persons by and to whom it was published (*l*).

It is for the judge to say whether the words are reasonably capable of a defamatory meaning, but for the jury to say whether under the circumstances of the case they in fact bear that meaning (*l*). In the recent case of *Nevill v. Fine Art and General Insurance Co.* (*m*), in the House of Lords, it was pointed out by Lord Halsbury, L.C., that in order to justify

(*f*) *Clay v. Roberts* (1863), 9 Jur. N. S. 580.

(*g*) *Cox v. Cooper* (1863), 12 W. R. 75.

(*h*) Per Bramwell, B., in *Re Coghlan* (1864), 4 F. & F. 316.

(*i*) *Forbes v. King* (1833), 1 Dowl. 672; 2 L. J. Ex. 109.

(*k*) Per Lord Denman, C. J., in *Hoare v. Silverlock* (1848), 12 Q. B. at p. 626.

(*l*) *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741; 52 L. J. Q. B. 232.

(*m*) (1897) App. Cas. at pp. 76, 77.

the judge in leaving the case to the jury "the words must be susceptible of a libellous meaning in this sense, that a reasonable man could construe them unfavourably in such a sense as to make some imputation upon the person complaining." "It is not enough to say that by some person or another the words *might* be understood in a defamatory sense" (n).

Where words are reasonably capable of an innocent and a defamatory meaning it is a question of fact for the jury in what meaning they were actually understood (o). And in every case the burden of proof is on the party who alleges that the words were understood in a meaning other than their natural and ordinary meaning. "If the word is an ordinary English word, then the Court will construe it in its natural meaning, unless some other is shown to have been given it. If the word is a cant expression or a commercial term (p), then the meaning may depend upon the circumstances in evidence" (q). But where the words complained of are ordinary English, and perfectly intelligible on the face of them, the plaintiff cannot call witnesses to state what they understood the words to mean, unless, indeed, he first

(n) (1897) App. Cas. at p. 73.

(o) *Churchill v. Gedney* (1889), 53 J. P. 471; *Ritchie v. Sexton* (1891), 64 L. T. 210.

(p) *Smith v. Jeffreys* (1846), 15 M. & W. 561; 15 L. J. Ex. 325.

(q) Per Bramwell, B., in *Barnett v. Allen* (1858), 27 L. J. Ex. at pp. 414, 415.

show that the words did not on this occasion bear their ordinary English meaning (*r*).

It is important to notice that where the words are not defamatory in the natural and ordinary sense, the plaintiff must be prepared to satisfy the jury that there were facts known both to the person publishing the defamatory matter and to the person to whom it was published which would naturally lead the latter to understand the words in a defamatory sense. As was pointed out by Brett, L. J., in the well-known case of *Capital and Counties Bank v. Henty* (*s*), "The first question for the jury is, whether the document would be read in a defamatory sense by persons of ordinary reason in the position of those to whom it is published. If in the opinion of the jury it would not be so read according to the *prima facie* meaning of the language, then there is a further question (if there is any evidence upon which it can be raised), whether there were facts known both to the person who framed the alleged libel and to the persons to whom it was published, which would lead the latter reasonably to put upon the document the construction that, having a second defamatory sense, it was issued ironically, or otherwise than in the primary sense of the language." In that case Messrs. Henty, some brewers at Chichester, issued to their tenants a circular

(*r*) *Daines v. Hartley* (1848), 3 Ex. 200.

(*s*) (1880), 5 C. P. D. at p. 539.

containing the following words :—"Messrs. Henty & Sons hereby give notice that they will not receive in payment any cheques drawn on any of the branches of the Capital and Counties Bank." The issue of this circular caused a run upon the bank, who thereupon brought an action of libel against Messrs. Henty. It was, however, held that the words in their natural and ordinary meaning were not libellous; that therefore it was for the plaintiffs to prove that by reason of the special circumstances of the case, they were understood in a special libellous sense: and that, in the absence of any such evidence, there was no case to go to the jury, and there must, therefore, be judgment for the defendants. Moreover, when the words are not *primâ facie* defamatory, and when the plaintiff therefore intends to maintain that the words were defamatory by reason of their being understood in a special sense, he must be careful to insert in his Statement of Claim an averment specifying the defamatory meaning of the words complained of, and showing how they come to have that meaning, and how they relate to the plaintiff (*t*). Such an averment is called an innuendo. No innuendo is necessary where the words complained of are defamatory in their ordinary meaning (*u*).

(*t*) *Russell and another v. Webster* (1874), 23 W. R. 59.

(*u*) Per Lord Selborne, in *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 748.

No action can be maintained for libel or slander unless there be publication, *i.e.*, a communication by the defendant of the words complained of to one person other than the plaintiff. Thus, there is no publication, and therefore no action will lie, if the defamatory matter be communicated only to the plaintiff. This was expressly decided in *Barrow v. Lewellin* (*x*), where the defendant despatched a sealed letter through the post to the plaintiff. As Lord Esher, M. R., said, in the recent case of *Pullman v. Hill & Co.* (*y*), "If the statement is sent straight to the person of whom it is written, there is no publication of it, for you cannot publish a libel of a man to himself. If a letter is not communicated to anyone but the person to whom it is written, there is no publication of it." It is, however, otherwise if it can be proved that the defendant knew when he posted the letter containing the libel that it would probably be opened by some person other than the plaintiff, for example, his clerk (*z*). So, too, "if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it" (*a*); for example, if he shows

(*x*) (1615), Hob. 62.

(*y*) (1891) 1 Q. B. at p. 527.

(*z*) *Delacroix v. Thevenot* (1817), 2 Stark. 63.

(*a*) Per Lord Esher, M. R., in *Pullman v. Hill & Co.*, (1891) 1 Q. B. at p. 527.

it to his own clerk, or places it in the hands of a typewriter, in order that such clerk or typewriter may copy it for him, there is a publication of the letter (*b*). Similarly, it has been held that there is a publication if the libel be written on a post-card (*c*), or contained in a telegram (*d*), for in each case "it is necessarily communicated to all the clerks through whose hands it passes" (*e*).

In accordance with the common law principle that husband and wife are one person, "the uttering of a libel by a husband to his wife is no publication" (*f*). "For many purposes they are, however, essentially distinct and different persons,—and amongst others, for the purpose of having the honour and feelings of the husband assailed and injured by acts or communications made to the wife" (*g*); thus, it has been held that sending a defamatory letter to a wife about her husband is sufficient publication (*h*).

Is the question of publication for the judge or for the jury? It is for the jury to find whether the facts on

(*b*) *Pullman v. Hill & Co.*, *supra*. See also *Boxsius v. Goblet Frères*, (1894) 1 Q. B. 842.

(*c*) *Robinson v. Jones* (1879), L. R. 4 Ir. 391.

(*d*) *Whitfield v. S. E. Ry. Co.* (1858), E. B. & E. 115.

(*e*) Per Brett, J., in *Williamson v. Freer* (1874), L. R. 9 C. P. 393.

(*f*) Per Huddleston, B., in *Wennhak v. Morgan* (1888), 20 Q. B. D. at p. 537.

(*g*) Per Maule, J., in *Wenman v. Ash* (1853), 13 C. B. 844, 845.

(*h*) *Wenman v. Ash* (1853), 13 C. B. 836; 22 L. J. C. P. 190.

which it is endeavoured to prove publication are true, but for the judge to decide whether the facts as proved constitute a publication.

Generally, *i.e.*, in all cases not coming within the exceptional class of cases presently to be noticed (*i*), the actionable or innocent character of words depends not on the intention with which they were published, but on their actual meaning and tendency when published, and the defendant will not be excused on the ground that he published the libel by accident or mistake (*k*), or in jest (*l*), or with an honest belief in its truth (*m*). Thus, the defendant was held liable in *Cook v. Ward* (*n*), where the plaintiff told some friends an absurd story about himself, and the defendant published it in his newspaper, simply for the purpose of amusing his readers, and believing that the plaintiff would not object. And in *Blake v. Stevens and others* (*o*), the plaintiff obtained 100*l.* damages against the defendants for the publication of a libellous state-

(*i*) See pp. 106, 107, 112—125, *infra*.

(*k*) *Blake v. Stevens and others* (1864), 11 L. T. 543; 4 F. & F. 232; *Shepherd v. Whitaker* (1875), L. R. 10 C. P. 502.

(*l*) 9 Rep. 59; and *Donoghue v. Hayes* (1831), Hayes' Irish Ex. Rep. 265.

(*m*) *Blackburn v. Blackburn* (1827), 4 Bing. 395; 3 C. & P. 146; 29 R. R. 583; per Maule, J., in *Wenman v. Ash* (1853), 13 C. B. 836; 22 L. J. C. P. 190; *Huntley v. Ward* (1859), 6 C. B. N. S. 514; 1 F. & F. 552.

(*n*) (1830), 6 Bing. 409; 31 R. R. 456.

(*o*) (1864), 11 L. T. 543; 4 F. & F. 232.

ment, which had been inserted by mistake in a law book of which they were the publishers.

An action for libel lies on mere proof of publication, even though the plaintiff does not prove that he has suffered any special damage, i.e., the loss of some definite temporal advantage.

But plaintiff, in an action for slander, must prove special damage, except in four cases—

1. Where the words charge plaintiff with having committed a criminal offence (*not* necessarily an indictable offence) (*p*).

2. Where they impute that the plaintiff has an infectious or contagious disease (*q*).

3. Where they are spoken of him in relation to his trade, profession, or business. Thus, it is not actionable to call a stonemason a ringleader of the nine hours' system, since this hardly relates to his business (*r*).

4. Where the plaintiff is a woman or girl, and the words impute unchastity or adultery to her (*s*).

As to repetition of libel and slander.—It is no defence to an action for libel or slander that the defendant published it by way of repetition or hearsay (*t*), or that he gave his authority for

(*p*) *Webb v. Bevan* (1883), 11 Q. B. D. 609.

(*q*) *Villers v. Monsley* (1769), 2 Wils. 403.

(*r*) *Miller v. David* (1874), L. R. 9 C. P. 118.

(*s*) Slander of Women Act, 1891, 54 & 55 Vict. c. 51.

(*t*) *Watkins v. Hall* (1868), L. R. 3 Q. B. 396.

the words complained of (*u*). But a person who unconsciously circulates libellous matter, not knowing, or having no reason to suppose, that it is such, is not liable. Thus, though a newsvendor is *primâ facie* responsible for a libel contained in the paper he sells, he is not liable if he can prove (1) that he did not know it contained a libel, (2) that his ignorance was not due to any negligence on his own part, and (3) that he did not know, and had no reason to suppose, that the paper was likely to contain a libel (*x*).

It not unfrequently happens, in cases of slander, where the words are not actionable *per se*, that the person repeating the slander is in a worse position than the person from whom he heard it; for if the special damage necessary to support the action flows from the repetition, and not from the original publication of the words, the repeater may alone be liable, while the originator escapes; in such a case, however, the original utterer of the slander is himself liable for the repetition (1) where he authorizes its repetition (*y*), or (2) where he speaks in the presence of some one under a duty to repeat his words, knowing of the existence of such duty.

A corporation or company can sue for a libel affect-

(*u*) *M'Pherson v. Daniels* (1829), 10 B. & C. 263.

(*x*) *Emmens v. Pottle* (1885), 16 Q. B. D. 354.

(*y*) *Watkins v. Hall* (1868), L. R. 3 Q. B. 396.

ing its property (z); it can also sue for slander in relation to its trade or business.

The defences peculiar to an action of libel are four in number, viz. :—

I. Justification.

II. Fair comment.

III. Privilege.

IV. Apology.—This defence, is, however, only available where the libel is “contained in a public newspaper or other periodical publication.”

Similar defences, with the exception of IV., are open to the defendant in an action of slander.

I. Justification.

It is a good defence to an action of libel or slander that the words complained of are true (a).

The defendant must prove that the *whole* libel is *substantially* true. Thus, where the libel complained of is an article or paragraph preceded by a title, it is not sufficient to prove the truth of the facts stated in the article or paragraph: the title itself must be justified, or the plaintiff will succeed. So that in

(z) *Mayor, &c. of Manchester v. Williams*, (1891) 1 Q. B. 94; *South Hetton Coal Co. v. N. E. News Association, Limited*, (1894) 1 Q. B. 133.

(a) In criminal proceedings this is not enough; the defendant must then be prepared to go further and prove that not only are the words true, but also that it is for the public benefit that they should be published.

Bishop v. Latimer (*b*), where a newspaper published a paragraph preceded by the title, "How Lawyer B. treats his Clients," which contained a report of a case in which *one* client of Lawyer B. had been badly treated, it was held, although the case itself was accurately reported, that the title was not justified by the facts, and that the plaintiff was entitled to damages. In another case, *Clement v. Lewis and others* (*c*), where a newspaper had published a correct report of certain proceedings in the Insolvent Debtors' Court, preceded by the title "Shameful Conduct of an Attorney," the report was held privileged, but damages were recovered for the title.

If there is gross exaggeration, the plea of justification will fail. Thus, in *Clarkson v. Lawson* (*d*), where the libel stated that the plaintiff, a proctor, had been three times suspended for extortion, it was held to be no justification to prove that he had been *once* so suspended. So, where the defendant had stated that the plaintiff was a "libellous journalist," it was held that a plea of justification was not supported by proof that the plaintiff had libelled one person, who had obtained judgment against him for 100*l.* (*e*).

(*b*) (1861), 4 L. T. 775.

(*c*) (1822), 3 Br. & Bing. 297; 7 Moore, 200; 22 R. R. 533.

(*d*) (1829, 1830), 6 Bing. 266, 587; 31 R. R. 418, 425.

(*e*) *Wakley v. Cooke and Healey* (1849), 19 L. J. Ex. 91; 4 Ex. 511.

So if an account of a trial be published setting out counsel's speech, and stating that the facts opened were proved, when actually the evidence only bore out part of the facts so stated, it is no defence to plead that the facts were so stated by counsel—the facts so stated must be proved true, or the defendant will fail (*f*).

On the other hand, it is not necessary to justify every detail of the charge or general terms of abuse, provided that the gist of the libel is proved to be in substance correct, and that the details, &c., which are not justified, produce no different effect on the mind of the reader than the actual truth would do (*g*). Thus, where the libel complained of was that "L., B., and G. are a gang who live by card-sharping," it was held to be sufficient justification to prove that upon two distinct occasions L., B., and G. had cheated at cards (*h*).

II. Fair and bona fide Comment.

No action lies if the defendant can prove that the words complained of are a fair and bona fide comment on a matter of public interest.

The Court decides whether the matter commented on is one of public interest; the jury, if the Court

(*f*) *Lewis v. Walter* (1821), 4 B. & Ald. 605; 23 R. R. 415.

(*g*) *Willmetts v. Harmer and another* (1837), 8 C. & P. 695.

(*h*) *Reg. v. Labouchere* (1880), 14 Cox, C. C. 419.

is of opinion that there is some evidence that the comment is unfair, finds whether it is so in fact.

“It is incorrect to say, as some writers do, that *bonâ fide* comments on matters of public interest come under qualified privilege” (*i*). The defence in such a case really is, that the words are not defamatory—that fair and proper comment is no libel (*k*). “It is only when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all” (*l*). If such comments *were* privileged, in order to succeed plaintiff would have to prove malice, however false and injurious the words complained of may have been, while defendant would only have to prove that at the time he made the charges he believed that they were true, and this is certainly not the law (*m*).

“Fair and bona fide comment.”—The limits of fair comment on matters of public interest are very wide. “Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say

(*i*) Per Blackburn, J., in *Campbell v. Spottiswoode* (1863), 32 L. J. Q. B. 185; 3 B. & S. 769. And see per Lord Esher, M. R., and Bowen, L. J., in *Merivale v. Carson* (1887), 20 Q. B. D. 275.

(*k*) *Campbell v. Spottiswoode* (1863), 32 L. J. Q. B. 185; 3 B. & S. 769.

(*l*) Per Bowen, L. J., in *Merivale v. Carson* (1887), 20 Q. B. D. at p. 283.

(*m*) See Odgers on Libel and Slander, 2nd ed. p. 33.

whether any fair man would have made such a comment. . . . Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this: would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said?" (n).

"The nearest approach, I think, to an exact definition of the word 'fair' is contained in the judgment of Lord Tenterden, C. J., in *Macleod v. Wakley* (o), where he said, 'Whatever is fair and can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable, unless it appears that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author; then it will be a libel.' It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism. . . . The writer would be travelling out of the region of

(n) Per Esher, M. R., in *Merivale v. Carson* (1887), 20 Q. B. D. at pp. 280, 281.

(o) (1828), 3 C. & P. at p. 313.

fair criticism if he imputes to the author that he has written something which in fact he has not written" (*p*).

And the question whether the words are or are not fair comment is essentially for the jury. "Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men or the proceedings in courts of justice or in Parliament, or the publication of a scheme or a literary work. But it is always left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not allowed to overstep these limits" (*q*).

All comment must be *bonâ fide*. Criticism must not be made a cloak for malice. There should be no insinuation of improper and dishonourable conduct, unless the critic can prove that such conduct did in fact exist; and it is no defence that defendant honestly believed the charges to be true (*r*).

The matter commented on must be actual fact.

(*p*) Per Bowen, L. J., in *Merivale v. Carson* (1887), 20 Q. B. D. at pp. 283, 284.

(*q*) Per Crompton, J., in *Campbell v. Spottiswoode* (1863), 3 B. & S. at p. 778.

(*r*) Per Cockburn, C. J., in *Campbell v. Spottiswoode* (1863), 32 L. J. Q. B. 185; *Brenon v. Ridgway* (1887), 3 Times L. R. 592.

The very statement, indeed, of the rule set out on p. 100, *supra*, "assumes the matters of fact commented upon to be somehow or other ascertained. It does not mean that a man may invent facts, and comment on the facts so invented in what would be a fair and *bonâ fide* manner on the supposition that the facts were true. . . . If the facts as a comment upon which the publication is sought to be excused do not exist, the foundation of the plea fails" (s). A newspaper may not set out evidence which might have been, but was not in fact given, and suggest as an inference therefrom that the prisoner, though acquitted, was really guilty (t). It may comment on evidence actually given (u), but may not charge a witness with having committed perjury (x). The defendant will not, however, be liable for trivial mistakes made accidentally, for "it is not to be expected that a public journalist will always be infallible" (y).

Matter of public interest.—Under this description come all State matters; everything which concerns

(s) Per cur. in *Lefroy v. Burnside* (1879), 4 L. R. Ir. at p. 565; see also per cur. in *Davis & Sons v. Shepstone* (1886), 11 App. Cas. at p. 190.

(t) *Rex v. White and another* (1808), 1 Camp. 359, n.; 10 R. R. 705, n.

(u) *Hedley v. Barlow* (1865), 4 F. & F. 224.

(x) *Roberts v. Brown* (1834), 10 Bing. 519.

(y) Per Cockburn, C. J., in *Woodgate v. Ridout* (1865), 4 F. & F. 217.

government, either House of Parliament, or any committee thereof (*z*); the public conduct of every one who takes part in public affairs (*a*), but not the private conduct of such persons save in so far as it affects their public relations (*b*); legal (*c*) and ecclesiastical matters (*d*); the management of the poor and the administration of the poor law (*e*); places of public amusement or entertainment (*f*); literature (*g*), but not the private character of an author (*h*) or journalist (*i*); art (*k*); anything, in short, which invites public attention or criticism (*l*).

(*z*) *Dunne v. Anderson* (1825), 3 Bing. 88; 1 Moore, 407; R. & M. 287; 28 R. R. 591; *Wason v. Walter* (1870), L. R. 4 Q. B. 73; 38 L. J. Q. B. 34.

(*a*) Per Bramwell, B., in *Kelly v. Sherlock* (1866), L. R. 1 Q. B. at p. 689; 35 L. J. Q. B. 209.

(*b*) *Wisdom v. Brown* (1885), 1 Times L. R. 412; *Pankhurst v. Hamilton* (1887), 3 Times L. R. 500.

(*c*) Per Cockburn, C. J., in *Cox v. Feeney* (1863), 4 F. & F. 13; and in *Purcell v. Sowler* (1877), 2 C. P. D. 218 (C. A.).

(*d*) *Kelly v. Tintling* (1865), L. R. 1 Q. B. 699; 35 L. J. Q. B. 231.

(*e*) Per Cockburn, C. J., in *Purcell v. Sowler* (1877), 2 C. P. D. 215 (C. A.); 46 L. J. C. P. 308.

(*f*) *Dibdin v. Swan & Bostock* (1793), 1 Esp. 28; 5 R. R. 717; *Green v. Chapman* (1837), 4 Bing. N. C. 92; 5 Scott, 340.

(*g*) *Campbell v. Spottiswoode* (1863), 32 L. J. Q. B. 185; 3 B. & S. 769.

(*h*) *Fraser v. Berkeley* (1836), 7 C. & P. 621.

(*i*) *Russell and another v. Webster* (1874), 23 W. R. 59.

(*k*) *Thompson v. Shackell* (1828), M. & M. 187; 31 R. R. 728.

(*l*) *Morrison v. Belcher* (1863), 3 F. & F. 614; *Duplany v. Davis* (1887), 3 Times L. R. 184; *Merivale v. Carson* (1887), 20 Q. B. D. 275 (C. A.).

III. Privilege.

In certain cases, even though the words spoken or written be slanderous or libellous, in the interests of public policy the speaker or writer is not liable—in other words, the occasion is privileged.

On privileged occasions there is either:—

- A. **Absolute privilege**—where the public interest, or the due administration of justice, render the existence of malice immaterial; or
- B. **Qualified privilege**—where on proof of malice plaintiff succeeds.

Upon occasions of qualified privilege no action lies unless the plaintiff prove malice in fact. “The burden of proving this is on him, as was settled in *Clark v. Molyneux* (m). Malice in fact is not confined to personal spite and ill-will, but includes every unjustifiable intention to inflict injury on the person defamed, or, in the words of Brett, L. J., every wrong feeling in a man’s mind” (n).

It would greatly tend to accuracy of thought and clearness of expression in connection with this branch of the law if the word *malice* were only used in the above sense, *i.e.*, as denoting malice in fact.

It is unnecessary and leads to confusion to use it

(m) (1872), 3 Q. B. D. 237.

(n) Per Lindley, L. J., in *Stuart v. Bell*, (1891) 2 Q. B. at p. 351.

in the sense of malice-in-law, *i.e.*, the intention of doing an act which in fact is the breach of a general legal duty, whether the actor knows it or not.

Defining malice, then, as malice in fact, it is true to say that, in considering the defendant's *liability* in an action for libel or slander, malice is immaterial, except where a question of qualified privilege is raised (*o*).

A. The following are the cases of absolute privilege (*p*):—

1. Parliamentary proceedings.
2. Judicial proceedings.
3. Naval, military, and State proceedings.

1. Parliamentary proceedings.—No member is in any way responsible for anything said in the House (*q*); but this privilege does not extend to anything said outside the walls of the House, or to a speech printed and privately circulated outside the House (*r*).

(*o*) On the other hand, the existence or non-existence of malice is often a material factor in considering what *damages* the plaintiff is entitled to.

(*p*) I am indebted to Mr. W. Blake Odgers, Q.C., for this threefold division, and also for that on pp. 112, 113, *infra*. See pp. 207, 221, of that learned Author's "Digest of the Law of Libel and Slander," 3rd ed.

(*q*) Bill of Rights, 1 Will. & M. st. 2, c. 2.

(*r*) *Rex v. Abingdon* (1794), 1 Esp. 226; 5 R. R. 733; *Rex v. Creevey* (1813), 1 M. & S. 273; 14 R. R. 427:

At common law, even if the whole House ordered the publication of parliamentary reports and papers, no privilege attached. Then came the famous case of *Stockdale v. Hansard* (*s*), which was followed by the statute 3 & 4 Vict. c. 9. By this statute, all reports, &c., published by order of either House of Parliament are absolutely privileged, and all proceedings, civil or criminal, are to be stayed at once on production of a certificate to that effect.

Reports of parliamentary proceedings, other than those protected by this statute, are conditionally, not absolutely, privileged (*t*).

2. Judicial proceedings.—No action lies for defamatory statements made or sworn in the course of a judicial proceeding before any court of competent jurisdiction.

“The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties for words written or spoken in the course of any proceeding before any court recognized by law, and this though the words written or spoken were written or spoken maliciously without any justifica-

(*s*) (1837), 7 C. & P. 731.

(*t*) See pp. 123; 124, *infra*.

tion or excuse, and from personal ill-will and anger against the person defamed" (*u*). "The ground of that rule is public policy" (*x*). Thus, every statement made by either party to his solicitor or counsel (*y*), and all pleadings (*z*) and affidavits (*a*) are **absolutely privileged**. Similarly, every statement made by an advocate whilst acting in that capacity, whether counsel or solicitor (*b*), or the party in person (*c*), is **absolutely privileged**, no matter how false or malicious or irrelevant to the matter in issue the words complained of may have been (*d*).

With regard to witnesses, jurors, and judges of inferior courts, the rule laid down above requires qualification. Every statement made by a witness in the box is **absolutely privileged**, provided that it refers to the inquiry before the court, and this is so even if the statement in question is volunteered (*e*) ; but no privilege would attach to the statements of a witness wholly unconnected with the matter in issue, and

(*u*) Per Lopes, L. J., in *Royal Aquarium, &c. Co. v. Parkinson*, (1892) 1 Q. B. at p. 451.

(*x*) Per Lord Esher, M. R., *ibid.*, at p. 442.

(*y*) *Bank of British North America v. Strong* (1876), 1 App. Cas. 307.

(*z*) *Lord Beauchamps v. Sir R. Croft* (1568), Dyer, 285 a.

(*a*) *Lilley v. Roney* (1892), 8 Times L. R. 642.

(*b*) *Munster v. Lamb* (1883), 11 Q. B. D. 588.

(*c*) *Hodgson v. Scarlett* (1818), 1 B. & Ald. 244 ; 19 R. R. 301.

(*d*) *Munster v. Lamb* (1883), 11 Q. B. D. 588.

(*e*) *Seaman v. Netherclift* (1876), 2 C. P. D. 53.

made entirely on his own account and to serve his own ends, or to statements made before entering or after leaving the box (*f*). So, too, every observation of a juror is absolutely privileged if connected with the matter in issue (*g*).

As regards words spoken by a judge, the general rule laid down above is true only of the judges of the superior courts (*h*). Every statement made in office by a judge of the superior court is absolutely privileged, and under no circumstances will an action lie therefor (*i*). A similar privilege is extended to words spoken in office by the judge of an inferior court of record, provided that he has jurisdiction in the matter before him. If he knows, or ought to know, that he has no jurisdiction, he is in no way protected (*k*). No privilege attaches to words spoken out of office (*l*). Everything said in office by a justice of the peace is also privileged, and no action lies therefor, unless the words complained of are wholly unconnected with the matter in issue, and are spoken maliciously and without reasonable and probable cause (*m*).

(*f*) *Trotman v. Dunn* (1815), 4 Camp. 211.

(*g*) *Rex v. Skinner* (1772), Loft, 55.

(*h*) For definition of superior court, see pp. 10, 11, *supra*.

(*i*) *Anderson v. Gorrie*, (1895) 1 Q. B. 668.

(*k*) *Houlden v. Smith* (1850), 19 L. J. Q. B. 70.

(*l*) *Paris v. Levy* (1861), 30 L. J. C. P. 12.

(*m*) *Kirby v. Simpson* (1854), 10 Ex. 358; *Gelen v. Hall* (1857), 2 H. & N. 379.

It is, however, important to notice that this privilege is confined to statements made in the course of strictly judicial proceedings, and is one which will not be extended. "It belongs to courts recognized by law, and to such courts only" (*n*). A meeting of the London County Council for granting music and dancing licences is not such a court, and, therefore, defamatory statements made by a county councillor at such a meeting with regard to a person applying for a licence are not absolutely protected, but have only a qualified privilege, which may be rebutted by proof of express malice (*o*).

Reports of judicial proceedings are not absolutely, only conditionally, privileged (*p*). There is a possible exception to this in the case of such reports published in a newspaper, and which fall within the protection of sect. 3 of the Law of Libel Amendment Act, 1888. The point has never yet arisen; but it is submitted that such reports are *absolutely* privileged (*q*).

3. Naval, military, and State proceedings.—Every-

(*n*) Per Lopes, L. J., in *Royal Aquarium, &c. Co. v. Parkinson*, (1892) 1 Q. B. at p. 451.

(*o*) *Royal Aquarium, &c. Co. v. Parkinson*, (1892) 1 Q. B. 431.

(*p*) See pp. 112—113, 121—122, *infra*.

(*q*) For the arguments in support of this contention, see the Author's "Principles and Practice of the Law of Libel and Slander," 2nd ed. p. 108, William Clowes & Sons, Limited, London, 1897.

thing done in the course of any naval or military proceeding is absolutely privileged. Thus, any defamatory statement made before a naval or military court-martial, no matter how untrue and malicious, is protected (*r*). Similarly, no action lies in respect of such a statement in a report made in the course of military or naval duty (*s*). For reasons of public policy the same protection would, no doubt, be given to anything in the nature of an act of State, *e. g.*, to every communication relating to State matters made by one minister to another or to the Crown (*t*).

B. The following are the cases of qualified privilege, in which proof of malice enables plaintiff to succeed :—

1. "When the circumstances are such as to cast on the defendant the duty of making the communication to a third party" (*u*).
2. "When the defendant has an interest in making

(*r*) *Dawkins v. Lord Rokeby* (1875), L. R. 7 H. L. 744; 45 L. J. Q. B. 8, Cockburn, C. J., dissentiente.

(*s*) *Dawkins v. Lord Paulet* (1869), L. R. 5 Q. B. 94; 39 L. J. Q. B. 53.

(*t*) This passage, which appears in the Author's "Principles and Practice of the Law of Libel and Slander," 2nd ed. p. 106, was cited with approval by Lord Esher, M. R., and Kay, L. J., in *Chatterton v. Secretary of State for India in Council*, (1895) 2 Q. B. at pp. 191, 194.

(*u*) Per Lopes, L. J., in *Pullman v. Hill & Co.*, (1891) 1 Q. B. at p. 530.

the communication to the third person, and the third person has a corresponding interest in receiving it" (u).

3. Fair and impartial reports of proceedings—
 (a) in Parliament; or (b) in any court of justice; or (c) in any public meeting, or meeting of certain public bodies and persons specified in sect. 4 of the Law of Libel Amendment Act, 1888.

"The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge, not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury, but, when the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion" (x). Further, it must be remembered, "as was pointed out by Lindley, L. J., in *Stuart v. Bell* (y), the question whether the occasion is privileged does not depend upon the defendant's belief that it is so" (z).

1. Duty.—(a) *Communications made in pursuance of a duty owed to society*.—"The rule is this, that where

(u) Per Lopes, L. J., in *Pullman v. Hill & Co.*, (1891) 1 Q. B. at p. 530.

(x) Per Lord Esher, M. R., in *Hebditch v. McIlwaine*, (1894) 2 Q. B. at p. 58.

(y) (1891) 2 Q. B. 341.

(z) Per A. L. Smith, L. J., in *Hebditch v. McIlwaine*, (1894) 2 Q. B. at p. 63.

the circumstances are such as to cast on the defendant the duty of making the communication to a third party, the occasion is privileged" (a). "The duty may be legal, social, or moral" (b). "Where," says Blackburn, J. (c), "a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then, if he *bonâ fide* and without malice does tell them, it is a privileged communication." Thus, where a person answers an inquiry *bonâ fide* and without malice, the answer is a privileged communication, and this is true of every answer to a confidential inquiry; for in the language of Grove, J., in *Robshaw v. Smith* (d), "everyone owes it as a duty to his fellow men to state what he knows about a person when inquiry is made," and everything pertinent to the subject of the inquiry which subsequently passes between the parties is also privileged (e).

"The belief of the defendant that there was a duty to make the communication is irrelevant to the question whether the occasion is privileged" (f).

(a) Per Lopes, L. J., in *Pullman v. Hill & Co.*, (1891) 1 Q. B. at p. 530.

(b) Per Lopes, L. J., in *Stuart v. Bell*, (1891) 2 Q. B. at p. 353.

(c) *Davies v. Snead* (1870), L. R. 5 Q. B. 611.

(d) (1878) 38 L. T. 43.

(e) *Beatson v. Skene* (1860), 29 L. J. Ex. 430.

(f) Per Lord Esher, M. R., in *Hebditch v. McIlwaine*, (1894) 2 Q. B. at p. 103.

Even if volunteered, the communication may fall within the protection of the general rule laid down above; for "it is not necessary in all cases that the information should be given in answer to an inquiry" (*g*), though under such circumstances it will, of course, be more difficult for the defendant to satisfy a jury that in making the communication he was not actuated by malice (*h*).

Under this head of privilege come communications as to the characters of clerks and servants. No one is obliged to give his clerk or servant a character (*i*); but if he does so he must do it honestly, and then, even if it be in fact untrue, the master will be protected (*k*). If a master after giving a servant a character discovers facts unfavourable to him, and communicates these to the person to whom he had previously given such character, such communication is privileged (*l*); and if a master discharges one of his servants and tells the others why he has done so, such communication will also be privileged (*m*). Thus,

(*g*) Per Jessel, M. R., in *Waller v. Loch* (1881), 7 Q. B. D. at p. 621.

(*h*) Per Littledale, J., in *Pattison v. Jones* (1828), 8 B. & C. at p. 586.

(*i*) *Carrol v. Bird* (1800), 3 Esp. 201; 6 R. R. 824.

(*k*) *Rogers v. Clifton* (1803), 3 B. & P. 587; *Murdoch v. Funduklian* (1886), 2 Times L. R. 614.

(*l*) *Gardner v. Slade* (1849), 18 L. J. Q. B. 334.

(*m*) *Somerville v. Hawkins* (1850), 10 C. B. 590; 20 L. J. C. P. 131.

where the plaintiff was a guard in the service of the defendants, a railway company, and the defendants dismissed him on the ground that he had been guilty of gross neglect of duty and published his name in a printed monthly circular addressed to their servants, stating in it that he had been dismissed, and the ground of his dismissal, it was held that such circular was privileged if published *bonâ fide* and without malice towards the plaintiff (*n*).

A similar protection is extended to all communications, made *bonâ fide* and on reasonable grounds, to a father respecting his child (*o*), or to a master as to his servant (*p*); by one friend to another as to a doctor (*q*), or tradesman (*r*), or an intending suitor (*s*); by a servant to his master (*t*); by an undermaster to the headmaster (*u*); by an official in the army or navy or any government office to his superior (*x*); by a master concerning his servant or a child entrusted to his charge, to the parent or guardian of such ser-

(*n*) *Hunt v. G. N. Ry. Co.*, (1891) 1 Q. B. 189.

(*o*) Per Erle, C. J., *Whiteley v. Adams* (1863), 33 L. J. C. P. at p. 95.

(*p*) *Masters v. Burgess* (1887), 3 Times L. R. 96.

(*q*) *Dixon v. Smith* (1860), 29 L. J. Ex. 125.

(*r*) *Storey v. Challands* (1837), 8 C. & P. 234.

(*s*) 15 C. B. N. S. 410, 411.

(*t*) *Scarl v. Dixon* (1864), 4 F. & F. 250.

(*u*) *Hume v. Marshall* (1878), 42 J. P. 136.

(*x*) *Stace v. Griffith* (1869), L. R. 2 P. C. 420.

vant or child (*y*); and by a solicitor to his client (*z*), even though he is not at the time engaged in the conduct of any legal proceedings on his behalf (*a*).

So, too, "if a communication made by a solicitor to a third party (*e.g.*, his clerk) is reasonably necessary and usual in the discharge of his duty to his client and in the interest of his client, the occasion is privileged" (*b*).

In all the above cases it must, however, be remembered that the privilege does not extend to expressions wholly unwarranted by the circumstances of the case (*c*), nor to unnecessary publication (*d*). On the other hand, the fact that there were other persons present than those to whom the defendant was under a duty to make the statement in question will not necessarily destroy the privilege. If their presence was accidental or could not be prevented by the defendant, the privilege will not be lost. Thus, in *Pittard v. Oliver* (*e*), it was held that the privilege which would have attached to defama-

(*y*) *Fowler and Wife v. Homer* (1812), 3 Camp. 294; 13 R. R. 807.

(*z*) *Wright v. Woodgate* (1835), 2 C. M. & R. 573.

(*a*) *Davis v. Reeves* (1855), 5 I. R. C. L. 79.

(*b*) Per Lopes, J., in *Boxsius v. Goblet Frères*, (1894) 1 Q. B. at p. 846.

(*c*) *Warren v. Warren* (1834), 1 C. M. & R. 251.

(*d*) *Browne v. Croome* (1817), 2 Stark. 292; 19 R. R. 727.

(*e*) (1891) 1 Q. B. 474.

tory statements made at a meeting of a board of guardians, of which the defendant was a member, was not destroyed by the presence of reporters. "Was the defendant's duty to the guardians and to the ratepayers generally taken away by the presence of these other persons who were not called in by him, and over whose presence he could exercise no control? the question answers itself; the presence of these persons left his duty to discuss the matters untouched; the occasion was privileged for the performance of that duty, and the privilege was not taken away by the presence of such people under such circumstances" (*f*).

(b) *Communications made in self-defence*.—Thus, if the plaintiff has previously attacked the defendant, any statement made by the latter which is necessary in order to protect himself, and which is in any way relevant to the accusations made against him by the plaintiff is privileged; *e.g.*, where the policy-holder of an insurance company published a pamphlet charging the directors with fraud, and the directors published a pamphlet in reply defending themselves, and accusing the plaintiff of making false and calumnious accusations, and further stating that he had upon a certain occasion made statements on oath in direct contradiction of statements which he

(*f*) Per Lord Esher, M. R., in *Pittard v. Oliver*, (1891) 1 Q. B. at p. 478.

had previously made in writing, it was left to the jury to say whether the counter-charges made by the defendants were made *bonâ fide*, and whether they went beyond the occasion, and the jury found for the defendants (*g*). So, too, where the plaintiff has previously attacked the defendant in the newspapers (*h*), or in public (*i*), and the latter retaliates by publishing in the papers in self-defence a statement of the case from his point of view, and in so doing makes defamatory statements concerning the plaintiff, such statement is privileged if made *bonâ fide*.

The privilege may be lost if the extent of publication is excessive—*e.g.*, in a matter of purely local or private importance it cannot be necessary to write to the *Times*, or to advertise. In such a case, the extent given to the announcement is evidence of malice to go to the jury (*k*).

2. Interest.

“If the communication was of such a nature that it could be fairly said that those who made it had an interest in making such a communication, and those

(*g*) *Koenig v. Ritchie* (1862), 3 F. & F. 413; *R. v. Veley* (1865), 4 F. & F. 1117.

(*h*) *Coward v. Wellington* (1836), 7 C. & P. 531.

(*i*) *Laughton v. Bishop of Sodor and Man* (1872), L. R. 4 P. C. 495.

(*k*) *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741.

to whom it was made had a corresponding interest in having it made to them,—when those two things co-exist, the occasion is a privileged one” (*l*). This common interest may be in respect of family affairs—*e.g.*, communications made *bonâ fide* to a lady by her son-in-law, as to the character of her intended husband (*m*), or it may be in respect of money matters—*e.g.*, a letter written by a ratepayer affecting the character of the parish constable, to be read at a parish meeting at which the accounts of the parish were to be considered (*n*), or in respect of a particular profession or calling—*e.g.*, anything said by a life governor of a school to its steward concerning one of the tradesmen employed to supply the school (*o*), or in respect of any right or duty recognized by the law—*e.g.*, a letter written by a creditor who had been appointed trustee in liquidation of a debtor’s estate to another creditor (*p*), or by a solicitor writing on behalf of his client, and in the ordinary course of his duty to a third party (*q*).

But in all these cases the privilege will be lost if

(*l*) Per Lord Esher, M. R., in *Hunt v. G. N. Ry. Co.*, (1891) 2 Q. B. at p. 191.

(*m*) *Todd v. Hawkins* (1837), 8 C. & P. 88.

(*n*) *Spencer v. Amerton* (1835), 1 Moo. & R. 470.

(*o*) *Humphreys v. Stilwell* (1862), 2 F. & F. 590.

(*p*) *Spill v. Maule* (1869), L. R. 4 Ex. 232; 38 L. J. Ex. 138.

(*q*) *Quartz Hill Gold Mining Co. v. Beall* (1882), 20 Ch. D. 509; *Baker v. Carrick*, (1894) 1 Q. B. 838.

the statement is made to an unnecessarily large number of persons (*r*), or contains exaggerated and unwarrantable expressions (*s*), or extends to matters outside those in which the plaintiff and defendant have a common interest (*t*).

**3. Fair reports of proceedings (A) in courts of justice ;
(B) in Parliament ; (C) in public meetings.**

**(A) Reports of proceedings in courts of justice,
in order to be privileged must be—**

a. Bona fide, accurate, and impartial :

i.e., “substantially a fair account of what took place” (*u*) in court.

It is immaterial by whom the report was published. In the words of Brett, L. J., the privilege is the same “for a private individual as for a public newspaper” (*x*). “There is no special privilege for newspapers” (*y*).

Formerly, reports of *ex parte* proceedings were not privileged. *Currie v. Walter* (*z*)

(*r*) *Duncombe v. Daniell* (1837), 8 C. & P. 222.

(*s*) *Bromage v. Prosser* (1825), 4 B. & C. 247 ; 28 R. R. 241.

(*t*) *Warren v. Warren* (1834), 1 C. M. & R. 250.

(*u*) Per Lord Campbell, C. J., in *Andrews v. Chapman* (1853), 3 C. & K. at p. 289.

(*x*) *Milissich v. Lloyds* (1877), 46 L. J. C. P. 404.

(*y*) Per Day, J., in *Rumney v. Walter*, (1892) 8 Times L. R. at p. 262.

(*z*) (1796), 1 B. & P. 525 ; 4 R. R. 717.

and *Lewis v. Levy* (a) decided that such reports are privileged if the *ex parte* proceedings result in the discharge by the magistrate of the party charged; it must now, however, be considered settled by *Usill v. Hales* (b) and *Kimber v. The Press Association* (c) that all reports of *ex parte* proceedings are privileged. In the former case an action was brought against the proprietors of the *Daily News*, the *Standard*, and the *Morning Advertiser* for publishing a report of an *ex parte* application by three engineers to a magistrate for criminal process against the plaintiff, stating that the plaintiff had employed, but not fully paid, them. It was held that such report of *ex parte* proceedings was privileged, as being fair and accurate.

b. Not prohibited by order of the court:

c. Not blasphemous, seditious, nor immoral:

In all the above cases, even if the report be true and correct, yet it will not be privileged if plaintiff proves that defendant, who sent the report to the newspaper, was actuated by malice (d).

(a) (1858), 27 L. J. Q. B. 287.

(b) (1878), 3 C. P. D. 319.

(c) (1893) 1 Q. B. 65 (C. A.).

(d) *Stevens v. Sampson* (1879), 5 Ex. D. 53. As to a possible exception to this rule, see p. 111, *supra*.

Where judicial proceedings last more than one day, and publication is not expressly forbidden by the court, a report published daily is privileged, if fair and accurate, *but* no comment is allowed until the proceedings terminate (*e*).

- (B) **Reports of Parliamentary proceedings.** Every fair and accurate report of any proceeding in either House of Parliament, or in any committee thereof, is privileged. The analogy between such reports and those of legal proceedings is complete. Whatever would deprive a report of a trial of immunity will equally deprive a report of Parliamentary proceedings of all privilege.

The above rule was for a long time doubtful; it is now clearly and satisfactorily settled by *Wason v. Walter* (*f*), in which case the plaintiff sued the proprietor of the *Times* for publishing a report of a debate in the House of Lords commenting severely on plaintiff's conduct in procuring the presentation of a petition to the House of Lords, which charged a high judicial officer with misconduct; and it was held that the report was privileged.

(*e*) *Lewis v. Levy* (1858), 27 L. J. Q. B. 287.

(*f*) (1868), 4 Q. B. D. 73.

The privilege attaching to fair and accurate reports may, of course, be rebutted by proof of actual malice. In these cases there are two distinct questions for the jury—

1. Is the report fair and accurate? If so, it is *primâ facie* privileged; if not, verdict for plaintiff. If this question is answered in the affirmative,
2. Was the report, though fair and accurate, published maliciously?

(C) By the Law of Libel Amendment Act, 1888, s. 4, a fair and accurate report in a newspaper of the proceedings of a public meeting, or of any meeting of a vestry, town council, school board, or other public bodies and persons specified in such Act, is privileged, provided that—

- (1) Such report is fair and accurate;
- (2) The matter complained of is not blasphemous or indecent; and
- (3) The matter complained of is of public concern, or the publication thereof is for the public benefit. This privilege may be rebutted by proof (1) that the report was published or made maliciously; or (2) that the defendant has, after request, refused or neglected to insert in his newspaper a reasonable letter

or statement by way of contradiction or explanation of such report (*g*).

Unless, therefore, a report is—

- (a) Of proceedings in a court of justice; or
- (b) Of parliamentary proceedings; or
- (c) Within the protection of sect. 4 of the Law of Libel Amendment Act, 1888,

it is no defence to plead that the report is a true, correct, and faithful report of what actually took place.

The defendant must rely on—

- (1) The matter published being strictly true, and (if defendant in criminal case) for the public benefit; or
- (2) The words used being a fair and *bonâ fide* comment on a matter of public interest.

IV. Apology.

This statutory defence is only available in an action for a libel contained in a *public newspaper or other periodical publication* (*h*); and the defendant must prove (1) that the libel was published without actual malice and without gross negligence; and (2) that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such

(*g*) For further information on this subject, see the Author on “Principles and Practice of the Law of Libel and Slander,” 2nd ed. pp. 121—131 : William Clowes & Sons, Limited, London, 1897.

(*h*) 6 & 7 Vict. c. 96 (Lord Campbell’s Act), s. 2.

newspaper or publication a full apology for such libel.

Moreover, there must be a payment of money into court by way of amends at the time the plea is filed (*i*), and therefore, having regard to Ord. XXII., Rule 1, no other defence denying liability can be pleaded together with such plea.

Injunctions.—The court has jurisdiction in an action of libel or slander to restrain by injunction either before or at the trial any further publication of such libel or slander (*k*), but in the former case the jurisdiction will be exercised with great caution (*l*).

In order to obtain an interim injunction the plaintiff must prove that the words complained of are untrue (*m*), and that, therefore, any subsequent publication by the defendant would be *malâ fide* (*n*), and, further, that unless at once restrained such statements will cause immediate (*o*) and irreparable (*p*) injury to person or property. Where, however, the words complained of affect the plaintiff in the way of

(*i*) 8 & 9 Vict. c. 75, s. 2.

(*k*) *Saxby v. Easterbrook* (1878), 3 C. P. D. 339.

(*l*) *Quartz Hill Gold Mining Co. v. Beall* (1881), 20 Ch. D. 501.

(*m*) *Burnett v. Tak* (1882), 45 L. T. 743.

(*n*) *Halsey v. Brotherhood* (1881), 19 Ch. D. 336.

(*o*) *Salamon v. Knight*, (1891) 2 Ch. 294.

(*p*) *Mogul Steamship Co. v. McGregor, Gow & Co.* (1885), 15 Q. B. D. 467.

his business, it seems that irreparable injury will be presumed (q).

There have lately been several important cases on this branch of the law, and "in a judgment of the present Master of the Rolls which underlies every subsequent decision on the subject" (r), the rule of practice is thus stated: "To justify the court in granting an interim injunction, it must come to a decision upon the question of libel or no libel before the jury decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases where any jury would say that the matter complained of was libellous, and where if the jury did not so find, the court would set aside the verdict as unreasonable. The court must also be satisfied that in all probability the alleged libel was untrue, and, if written on a privileged occasion, that there was malice on the part of the defendant. It followed from those three rules that the court could only on the rarest occasions exercise the jurisdiction" (s). Thus, in *Collard v.*

(q) *Thomas v. Williams* (1880), 14 Ch. D. 864.

(r) Per Lopes, L. J., in *Monson v. Tussauds, Limited*, (1894) 1 Q. B. at p. 693.

(s) Per Lord Esher, M. R., in *Coulson v. Coulson* (1887), 3 Times L. R., at p. 846; approved and in part adopted by the full Court of Appeal in *Bonnard v. Perryman*, (1891) 2 Ch. at p. 284; and, again, per Lopes, L. J., and Davey, L. J., in *Monson v. Tussauds, Limited*, (1894) 1 Q. B. at pp. 693, 696, 697.

Marshall (t) an interlocutory injunction was granted to restrain the defendant, who was the secretary of a trade union, from publishing a placard stating that there was a strike now on at the plaintiff's works; that the sweating system was practised, and the polishing badly done there—these statements being held to be untrue, and the defendant not suggesting that he could produce further evidence in support of them.

The court has also a general jurisdiction to restrain by injunction the publication of any matter which tends to prejudice the administration of justice, provided that application for such relief is made without delay. Thus the publication of any comments on a pending trial will be restrained, whether such comments amount to a libel (u) or not (x).

Slander of title.—Strictly speaking, this wrong has no place in a chapter on libel and slander, but for the sake of convenience it seems desirable to deal shortly with the subject. Slander of title consists of a false, malicious statement in writing, printing, or by word of mouth injurious to any person's title to property, and causing special damage to such person. For the publication of such statement an

(t) (1892) 8 Times L. R. 846.

(u) *Coleman v. West Hartlepool Harbour, &c. Co.* (1860), 8 W. R. 734.

(x) *Mackett v. Commissioners of Herne Bay* (1876), 24 W. R. 845.

action will lie. In such a case there is no wrong to the reputation—no defamation—and the action is not for libel or slander, but “an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff’s title” (y). In order to succeed the plaintiff must prove:—

- (1) That the statement is false ;
- (2) That it is malicious in fact ;
- (3) That it has caused him special damage.

It is also actionable to publish maliciously, or without lawful occasion, a false statement disparaging the goods of any person, and causing such person special damage (z). The malice spoken of above is want of good faith, or any corrupt or wrong motive.

(y) Per Tindal, C. J., in *Malachy v. Soper* (1835), 3 Bing. N. C. 371.

(z) *Western Counties Manure Co. v. Lawes Chemical Manure Co.* (1874), L. R. 9 Ex. 218, 222 ; *Ratcliffe v. Evans*, (1892) 2 Q. B. at p. 524 ; *White v. Mellin*, (1895) App. Cas. 154.

CHAPTER VIII.

OF WRONGS TO THE PERSON.

A.—Assault and Battery.

B.—False Imprisonment.

C.—Malicious Prosecution.

D.—Malicious Arrest.

A.—An assault is the unlawful laying of hands on another person, or an attempt or offer to do a corporal hurt to another, coupled with an apparent present ability and intention to do the act. No mere words can in any case amount to an assault (*a*).

A battery is the actual striking of another person, or touching him in a rude, angry, revengeful, or insolent manner. "The least touching of another in anger is a battery" (*b*).

"Such acts as are reasonably necessary for the common intercourse of life are not assaults or batteries, if they are done for the purpose of such inter-

(*a*) Stephen's Digest of the Criminal Law, p. 177.

(*b*) Per Holt, C. J., in *Coles v. Turner* (1705), 6 Mod. 149.

course only, and with no greater force than the occasion requires" (c).

Mayhem is assault and battery of such an aggravated character as to amount to an actual wounding of the person; or, according to an old definition, "the violently depriving another of the use of such of his members as may render him the less able in fighting to defend himself or to annoy his adversary."

Assault and battery are justifiable—

- (1) **In defence of person or property (d).** The force used must not, however, be more than is necessary under the circumstances. Under the first of these heads a man may justify himself on the ground of defending his wife, child, or probably even his friend.
- (2) **By reason of defendant's peculiar position,** *e.g.*, a father may chastise his child, or a schoolmaster his boys, or a captain the sailors on board his ship; but the chastisement must not be excessive or unreasonable.
- (3) **By leave and licence of party injured.**
- (4) **In the preservation of the public peace,** if committed during the continuance of the affray (e), and with no more force than is necessary.

(c) Stephen's Dig. Cr. Law, p. 177.

(d) See *Blades v. Higgs* (1861), 30 L. J. C. P. 347; and pp. 20, 42, 45, *supra*.

(e) *Noden v. Johnson* (1850), 16 Q. B. 218.

Defence under 24 & 25 Vict. c. 100, ss. 42—45.—

Where an assault is complained of before justices, and (1) the punishment imposed by the justices is suffered, or (2) after an actual hearing on the merits (*f*), when they give a certificate of acquittal on the ground (a) that the offence is deemed not proved, or (b) that it was “justified, or so trifling as not to merit any punishment,” then in the above cases there is immunity from “all further or other proceedings against defendant, civil or criminal, for the same cause.” “In *Reg. v. Morris* (*g*), it was held that these words mean subsequent proceedings for an assault, and that they are not meant to cover subsequent proceedings for the act constituting the assault” (*h*). Thus, in the case cited, it was held that if death followed an assault, for which the offender had been punished, he might, nevertheless, be indicted for manslaughter; and in the later case of *Masper v. Brown* (*i*) it was held that a man who had been fined for an assault on a married woman could not be subsequently sued by her husband for the damage he had sustained by the loss of his wife’s services.

(*f*) *Reed v. Nutt* (1890), 24 Q. B. D. 669; 59 L. J. Q. B. 311.

(*g*) (1867), L. R. 1 C. C. R. 90.

(*h*) Stephen’s Dig. Cr. Law, 4th ed. p. 192, n. 1.

(*i*) (1876), 1 C. P. D. 97.

The granting of the certificate by the justices may, if it be refused, be compelled by mandamus.

B.—False imprisonment is some unlawful detention of the person, either (1) actual, *e.g.*, laying hands upon a person; or (2) constructive, *e.g.*, by an officer telling anyone he is wanted and making him accompany him, as was done by a bailiff in *Grainger v. Hill* (*k*). There must be restraint or show of authority, but not necessarily incarceration. But the restraint must be total. A mere partial restraint is not sufficient. Thus, in *Bird v. Jones* (*l*), it was held that there was no imprisonment committed by two policemen, who merely hindered defendant from going on a portion of a public footway on a bridge which was appropriated by seats to view a regatta. The plaintiff need only prove the detention or imprisonment; the defendant must then justify what he did, which he can do—

I. If he acted under legal warrant.

II. If he acted without warrant;—

1. If a constable, he may arrest—

(1) Anyone whom he suspects to have committed a felony (*m*).

(2) To prevent a breach of the peace, or

(*k*) (1838), 4 Bing. N. C. 212.

(*l*) (1845), 7 Q. B. 742.

(*m*) Archbold's Criminal Pleading and Evidence, 21st ed., p. 799.

whenever a breach has been committed in his presence.

- (3) By statutory authority, *e.g.*, when he finds anyone committing an indictable offence by night or malicious injury to property.

2. If a private person, he may arrest—

- (1) Anyone whom he suspects to have committed a felony, provided that a felony has actually been committed (*m*).
- (2) To stay a breach of the peace or for treason.
- (3) By statutory authority, *e.g.*, under the Vagrancy Act (5 Geo. 4, c. 83), for indecent exposure, street gaming, &c.
- (4) Anyone for whom he has become bail, in order to give him up in his (the bailor's) discharge (*n*).

3. By reason of his position, *e.g.*, naval and military officers may detain their subordinates, a master his apprentice, or a father his child.

C.—Malicious prosecution is the malicious institu-

(*m*) Archbold's Criminal Pleading and Evidence, 21st ed., p. 799.

(*n*) *Ex parte Lyne* (1822), 3 Stark. 132; 23 R. R. 762.

tion against another of criminal, bankruptcy, or liquidation proceedings without reasonable and probable cause. Plaintiff must prove five things—

1. That defendant preferred a charge of the nature indicated (in above definition) against him before a judicial officer.
2. That defendant acted maliciously. The malice here spoken of is “malice in fact (*malus animus*), indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody” (o). As was pointed out by Bowen, L. J., in *Abrath v. N. E. Ry. Co.* (p), the plaintiff in an action of this kind must prove that the defendant acted “from an indirect and improper motive, and not in furtherance of justice.” In the words of Alderson, B. (q), “any motive, other than that of simply instituting a prosecution for the purpose of bringing a person to justice, is a malicious motive on the part of the person who acts in that way.” The existence of malice is purely a

(o) Per Hawkins, J., in *Hicks v. Faulkner* (1882), 8 Q. B. D. at p. 175.

(p) (1883), 11 App. Ca. at p. 247.

(q) *Stevens v. Midland Counties Railway Co.* (1851), 10 Ex. 356,

question of fact for the jury, who may, if they choose, infer it from the fact—

3. That the defendant acted without reasonable and probable cause. The jury find the facts on which the question of reasonable and probable cause depends, and the judge then decides whether the facts so found constitute reasonable and probable cause (r).
4. That the proceedings terminated in plaintiff's favour; but this need not be proved if the proceedings are in their nature incapable of terminating in the plaintiff's favour, *e.g.*, the malicious exhibition of articles of the peace (s).
5. That plaintiff has suffered in person, reputation, or pocket.

It has been held that an action for malicious prosecution will lie against a corporation or limited company (t); but there is an extra-judicial dictum of Lord Bramwell's to the contrary in *Abrath v. N. E. Ry. Co.* (u).

“The distinction between false imprisonment and malicious prosecution is well illustrated by the case where parties being before a magistrate, one makes

(r) *Perryman v. Lister* (1868), L. R. 4 H. L. 521.

(s) *Steward v. Gromett* (1859), 7 C. B. N. S. 191.

(t) *Edwards v. Midland Railway Co.* (1880), 6 Q. B. D. 287; *Kent v. Courage & Co.* (1890), 55 J. P. 264; 7 Times L. R. 50; *Rayson v. South London Tramways Co.*, (1893) 2 Q. B. 304.

(u) (1883), 11 App. Ca. 250.

a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment" (x). Thus the question is, does defendant set a ministerial or a judicial officer in motion? If the former, he may be liable for false imprisonment; if the latter, for malicious prosecution.

D.—Malicious arrest is wilfully putting the law in motion to effect the arrest under civil process of another without cause, and anyone committing this offence, *i.e.*, deliberately obtaining the arrest of another by a false statement or suppression, renders himself liable to an action for damages. The malice here spoken of is malice in law.

(x) Per Willes, J., in *Austin v. Dowling* (1870), L. R. 5 C. P. at p. 540.

CHAPTER IX.

OF WRONGS ARISING FROM FRAUD (*a*).

Fraud is a false representation of fact made with a knowledge of its falsehood, or without belief in its truth, or in reckless disregard whether it be true or false, with the intention that it should be acted upon by the complaining party. No action lies unless the plaintiff has been induced to act upon such false representation and actual damage has resulted—such damage being the natural and probable consequence of plaintiff's action on faith of defendant's statement.

In the leading case of *Derry v. Peek* (*b*), which came before the House of Lords in 1889, Lord Herschell thus summarized the law. "I think," said the learned judge, "the authorities establish the following propositions:—First, in order to sustain an action of deceit, there must be proof of fraud, and

(*a*) I am under considerable obligation to Sir William Anson's Law of Contract in respect of the first part of this chapter, and the student should carefully read pp. 203—215 of the 8th edition of that learned author's work.

(*b*) 14 App. Ca. at p. 374.

nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.” It is important, however, to notice a later passage in the same judgment which, as was subsequently pointed out by Lindley, L. J., in the Court of Appeal in *Angus v. Clifford* (c), “qualifies the former statement in a most material manner.” “In my opinion,” said Lord Herschell, in the passage referred to (d), “making a false statement through want of care falls far short of, and is a very different thing from fraud, and the same may be said of a false

(c) (1891) 2 Ch. at p. 465.

(d) 14 App. Ca. at p. 375.

representation honestly believed though on insufficient grounds." Therefore, as the Court of Appeal decided in *Angus v. Clifford* (e), there is no fraud for which an action will lie, if the defendant carelessly made a false statement without appreciating the importance and significance of the words used unless indifference to their truth is proved.

There must be a representation of fact false in itself, or combined with suppression of truth.—The active concealment of a material fact is sufficient; thus it was held that an action of deceit lay where the vendor of a house, knowing of a defect in the wall, plastered it up and papered it over (f); so, too, in *Schneider v. Heath* (g), where a ship was sold "with all faults," and the vendor, knowing of a latent defect, concealed it, and made a fraudulent representation as to its condition.

An action of fraud does not lie for a mere expression of opinion.—The phrase "worth so much" has been held to be merely an expression of opinion (h); "gave so much for it" a representation of fact (i).

Non-disclosure when there is no duty to disclose is not fraud.—In *Ward v. Hobbs* (j), defendant, knowing

(e) (1891) 2 Ch. 449.

(f) Cited in *Pickering v. Dowson* (1813), 4 Taunt. at p. 785.

(g) (1813), 3 Camp. 505; 14 R. R. 825.

(h) *Harvey v. Young* (1602), 1 Yelv. 20.

(i) *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 243.

(j) (1878), 4 App. Ca. 14.

that his pigs had a contagious disease, sent them to market, contrary to the Contagious Diseases (Animals) Act, 1869. The plaintiff bought them, there being no representation that they were sound, and one of the conditions of sale providing that the purchaser should take them "with all faults"; the greater number died, having infected other pigs belonging to the plaintiff. Held, no action lay. In *Keates v. Lord Cadogan* (*k*), where the defendant let a house to the plaintiff for a term of years (*l*), knowing it to be required for immediate occupation, without disclosing that it was in a ruinous condition, it was held that no action for fraud lay.

There must be knowledge of falsehood or absence of belief in, or reckless disregard of truth (*m*).—In *Dickson v. Reuter's Telegraph Co.* (*n*), defendants, by mistake in transmission of a message, caused the plaintiff to ship large quantities of barley which were not required, and which, owing to a fall in the market, resulted in heavy loss. The defendants were held not liable, the representation not being false to their knowledge.

Nor will an action of deceit lie for a representation

(*k*) (1851), 10 C. B. 591.

(*l*) *Contra*, if house let furnished for short period. Cf. *Smith v. Marrable* (1843), 11 M. & W. 5; *Wilson v. Finch-Hatton* (1877), 2 Ex. D. 336.

(*m*) *Reese River Mining Co. v. Smith* (1859), L. R. 4 H. L. 79.

(*n*) (1877), 3 C. P. D. 1.

which the defendant really and honestly believed to be true.—And it is immaterial whether such belief was held on reasonable grounds or not (*o*), except in so far as absence of reasonable cause may go to show that there was no real belief at all (*p*). If the representation is thought to be true at the time of making it, but is subsequently discovered to be false before the other party has acted upon it, it seems on principle that the defendant would be liable. This, at any rate, was the old rule of equity, which, by reason of the Judicature Acts, now prevails.

But the absence of dishonest motive is no defence.—In *Polhill v. Walter* (*q*), the defendant accepted a bill of exchange drawn on A., representing that he had A.'s authority to do so, and honestly believing that the acceptance would be sanctioned and the bill met by A. The bill was dishonoured. Held, an action for deceit lay against the defendant by an indorsee for value.

Nor can the defendant excuse himself by showing that he had nothing to gain by making the false representation.—In *Leddell v. McDougal* (*r*), plaintiff wrote to defendant, asking if defendant could recommend T.

(*o*) *Glasier v. Rolls* (1889), 42 Ch. D. 436; *Low v. Bouverie*, (1891) 3 Ch. 82.

(*p*) *Derry v. Peek* (1889), 14 App. Cas. 337.

(*q*) (1832), 3 B. & Ad. 114; see also *Peek v. Gurney* (1873), L. R. 6 H. L. 409.

(*r*) (1881), 29 W. R. 403.

as a safe and responsible tenant. Defendant wrote back that "he had much pleasure in replying affirmatively," knowing T. to be a man of no means, who had failed several times in business of the same kind. Held, defendant was liable, even though the letter was written out of pure kindness, and defendant had nothing to gain by making the false representation.

By the 4th section of the Statute of Frauds (*s*), a promise to answer for the debt, default, or miscarriage of another must be in writing and signed. The object of this provision was, however, practically evaded by a number of cases, notably *Pasley v. Freeman* (*t*), which were framed in tort instead of in contract.

In consequence of this, Lord Tenterden's Act, 9 Geo. 4, c. 14, was passed, requiring every eulogy of another's conduct, credit, ability, &c., made with the object of inducing trust of such person, to be in writing and signed by the party to be charged therewith, before an action for false representation would lie. According to the better opinion, only statements really going to the assurance of personal credit are within the statute (*u*).

(*s*) 29 Car. 2, c. 3.

(*t*) (1789), 3 T. R. 51; 1 R. R. 634.

(*u*) Per Parke and Alderson, BB., in *Lyde v. Barnard* (1836), 1 M. & W. 101; see also *Bishop v. Balkis Consolidated Co.* (1890), 25 Q. B. D. 512.

The statement need not be made to the injured party.—Thus in *Langridge v. Levy* (*v*), defendant sold a gun to the father of the plaintiff, for the use of himself and his sons, representing that the gun was made by Nock, and was sound. Plaintiff used the gun, which exploded, injuring his hand. Held, defendant was liable. The statement must, however, be made with the intention that the plaintiff should act upon it; and therefore, in *Peek v. Gurney* (*x*), directors, who would have been liable to original allottees of shares for false statements in the prospectus of a company, were held not liable to subsequent purchasers of shares which came into the market. And the injury must be the immediate, not the remote, consequence of the representation thus made (*y*).

Deceit which does not deceive is not fraud.—Thus, in *Horsfall v. Thomas* (*z*), the defendant sold a cannon to the plaintiff, having concealed a defect in it. Plaintiff never inspected the cannon, which, owing to the defect, burst on being used. Held, defendant was not liable, as plaintiff never inspected the cannon, and was not deceived by the attempted fraud (*a*).

(*v*) (1837), 2 M. & W. 519.

(*x*) (1873), L. R. 6 H. L. 377.

(*y*) *Peek v. Gurney*, *supra*.

(*z*) (1862), 1 H. & C. 90.

(*a*) See also *Smith v. Chadwick* (1882), 20 Ch. D. 27; and *Pasley v. Freeman* (1789), 3 T. R. 51; 1 R. R. 634.

The fact that the party deceived has the means at hand of finding out the truth is immaterial, if he make no actual independent inquiry (*b*). A mere perfunctory inquiry on the part of the party deceived is not sufficient (*c*). Thus, to escape liability the defendant may prove that the other party (1) knew the truth; or (2) relied wholly on his own investigation; or (3) was not really influenced in his conduct by the defendant's misrepresentation.

The position of directors and promoters of companies differs from that of the ordinary defendant in an action of deceit. By the **Directors' Liability Act, 1890** (*d*), directors, promoters, and persons who have authorized the issue of any prospectus or notice with regard to a company, are liable for loss or damage, caused by an untrue statement therein, to any person who has subscribed for any shares or debentures on the faith of such prospectus or notice, unless it is proved (a) that they not only believed in the statement but had reasonable ground for such belief; or (b) that it was a correct statement of the report or valuation of an engineer, valuer, accountant, or other expert, and even then they will be liable if it be proved that they had no reasonable ground for believing that such person was competent to make such

(*b*) *Dobell v. Stevens* (1825), 3 B. & C. 623; 27 R. R. 441.

(*c*) *Redgrave v. Hurd* (1881), 20 Ch. Div. 1.

(*d*) 53 & 54 Vict. c. 64, s. 3.

report or valuation ; or (c) that such statement was a correct and fair representation of a statement made by an official person, or contained in a public official document.

Misrepresentations made by agents.

The agent himself is personally liable, according to the general rules governing the law as to fraud. The liability of the principal depends on several considerations. The following cases appear on this matter :—

I. The principal knows the representation to be false.

(i) He authorizes the making of it. In this case, whether the agent knows it to be false or thinks it to be true, the principal is liable.

(ii) The representation is made by the agent in the general course of his employment, but without any specific authorization from the principal. When

(a) The agent knows it to be false, the principal is liable (e) ;

(b) The agent thinks it to be true. In this case the contract may always be rescinded ; but will an action for fraud lie against the principal ? The two following distinctions must be remembered :—

(α) *When the principal fraudulently keeps the knowledge from the agent, he is no doubt*

(e) Per Parke, B., in *Cornfoot v. Fowke* (1840), 6 M. & W. 358.

liable. This was admitted by all the barons in *Cornfoot v. Fowke* (*f*), and followed in *Ludgater v. Love* (*g*), where a father knowingly directed his son to make a false representation about the condition of some sheep.

(*β*) *When the knowledge is held back by the principal through inadvertence.* In this case it is probable that an action will lie against the principal, though this would be contrary to the decision in *Cornfoot v. Fowke* (*f*), where there was a mis-statement by the agent in good faith, and there was no suggestion of fraud on the part of the principal, about the condition of a house, and it was held that the plaintiff could not get out of his agreement on the ground of fraud. "I think," said Alderson, B., "it is impossible to sustain a charge of fraud, when neither the principal nor agent has committed any: the principal, because, though he knew the fact, he was not cognizant of the misrepresentation being made, nor even directed the agent to make it: and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his

(*f*) (1840), 6 M. & W. 359.

(*g*) (1881), 44 L. T. N. S. 694.

answer *bonâ fide*." Abinger, C. B., dissented, and it is very probable that this case will be overruled; if, indeed, it is even now law. Many dicta are to be found adverse to this decision, those of Willes, J., in *Barwick v. Eng. Joint Stock Bank* (*h*) being especially worthy of notice.

II. The principal thinks the representation to be true.

(i) He authorizes it to be made. When

(a) The agent knows at the time, or finds out afterwards, that it is false, the principal is liable (*h*);

(b) The agent thinks it to be true—here the principal is NOT liable.

(ii) The agent makes the representation in the general course of his employment, but without any specific authorization. When

(a) The agent knows it is false, the principal is liable (*i*). It has been suggested that this liability is limited to the amount of profit made, though in *Swire v. Francis* (*k*), the Privy Council held a principal liable who derived no profit at all. It is, however, possible that the limitation suggested

(*h*) (1867), L. R. 2 Ex. 259.

(*i*) *Udell v. Atherton* (1861), 7 H. & N. 181; and *Barwick v. Eng. Joint Stock Bank* (1867), L. R. 2 Ex. 259.

(*k*) (1877), 3 App. Cas. 106.

would be held applicable if the defendant were a corporation (*l*); though the point was not taken in *Denton v. Gt. N. Rail. Co.* (*m*).

- (b) The agent thinks it to be true—the principal is NOT liable.

Thus we find that the principal is liable in all possible cases, except when both he and his agent believe the latter's misrepresentation to be the truth.

(*l*) Per Lord Cranworth, in *Western Bank of Scotland v. Addie* (1867), L. R. 1 Sc. App. at pp. 166, 167; and see per Bowen, L. J., in *British, &c. Co. v. Charnwood, &c. Co.* (1887), 18 Q. B. D. at p. 719.

(*m*) (1856), 5 E. & B. 860.

CHAPTER X.

OF THE DUTY TO ABSTAIN FROM NEGLIGENCE,
AND OF CERTAIN WIDER DUTIES IMPOSED
IN SPECIAL CASES.

IN all cases of negligence, and, indeed, in all cases of tort, a man is answerable only for such consequences of his wrongful act or omission as, in the ordinary course of affairs, are the natural and probable consequences of such wrongful act or omission (*a*). Thus, in *Scott v. Shepherd* (*b*), the defendant threw a lighted squib into a crowded market place, where it was pitched about from hand to hand until it burst, putting out the eye of the plaintiff. The defendant was held liable. Two cases, one on each side of the line, may be usefully considered. In *Sharp v. Powell* (*c*), the defendant's servants washed a van in the street, in contravention of the Metropolitan Police Act. The water so used would, under ordinary circum-

(*a*) See "The Common Law," by Mr. Justice O. W. Holmes, Lecture III., especially pp. 108 *et seq.*

(*b*) (1773), 2 Wm. B. 892.

(*c*) (1872), L. R. 7 C. P. 253.

stances, have escaped through a grating ; but owing to a severe frost the grating had previously become blocked up with ice, and the water, not being able to escape, formed a sheet of ice. Upon this sheet of ice plaintiff's horse slipped and was injured. Held, the defendant was not liable, as the injury was not the natural consequence of his act. But in *Clark v. Chambers* (*d*), the defendant wrongfully placed a barrier with spikes across a road, leaving an opening for the purposes of traffic. A third party placed one of these spikes in the roadway. The plaintiff, lawfully passing along the road at night, was injured by this spike. Held, that the defendant was liable, as the injury was the natural and probable consequence of this act.

Negligence is the breach of a duty (*a*) to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or (*b*) to abstain from doing something which a prudent and reasonable man would not do (*e*).

It is important to remember that the defendant will not be legally responsible for not exercising the diligence of an average reasonable man, unless he is so situated that he is under a duty to exercise such

(*d*) (1878), 3 Q. B. D. 327.

(*e*) See per Alderson, B., in *Blyth v. Birmingham Waterworks Co.* (1856), 25 L. J. Ex. at p. 213.

diligence (*e*). In the words of Lopes, L. J. (*f*), “there cannot be a liability for negligence unless there is a breach of some duty.”

In *Blyth v. Birmingham Waterworks Co.* (*g*), it was held that a water company, which observed directions laid down by Act of Parliament in putting down their pipes, was not liable for negligence merely because the precautions which it had taken proved insufficient against the effects of a winter of extreme coldness, such as no ordinary person could have foreseen.

In *Holmes v. Mather* (*h*), defendant's horses, driven by defendant's servant, bolted, and became so unmanageable that the servant could not stop them, but could, to some extent, guide them. While trying to safely turn a corner, the servant guided them so that, unintended by him, they knocked down and injured plaintiff. Held, defendant was not guilty of negligence. Bramwell, B., is reported to have said (*i*):—“The driver is absolutely free from all blame in the matter. Not only does he not

(*e*) See Pollock, 5th ed. pp. 405—406, 408—409.

(*f*) In *Lane v. Cox*, (1897) 1 Q. B. at p. 418. See also *Newwith v. Over-Darwen Society* (1894), 63 L. J. Q. B. 290; 70 L. T. 374; *Le Lievre v. Gould*, (1893) 1 Q. B. 491.

(*g*) (1856), 25 L. J. Ex. 212.

(*h*) (1875), L. R. 10 Ex. 261. See also *Stanley v. Powell*, (1891) 1 Q. B. 86.

i) L. R. 10 Ex. at p. 267.

do anything wrong, but he endeavours to do that which is best under the circumstances. The misfortune happens through the horses being so startled by the barking of a dog that they ran away with the groom, and the defendant who is sitting beside him. Now, if the plaintiff, under such circumstances, can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress, or got into her eye, and so injured her. It seems manifest that, under such circumstances, she could not maintain an action."

Carriers of passengers are not, like carriers of goods, insurers. Their duty is to take due care (including in that term the use of skill and foresight), and is not a warranty that the carriage is, in every respect, fit for its purpose. In *Readhead v. Midland Rail. Co.* (*k*), where the accident was caused by a latent defect in a vehicle, which it was impossible, with the exercise of all due care, caution, and skill to have discovered, it was held that the railway company was not liable. Where, however, there is a sale of a chattel for a specific purpose, and therefore an implied warranty that the chattel is reasonably fit for such purpose, the defendant, even though not guilty of negligence, is liable for an accident caused by a latent defect in

(*k*) (1869), L. R. 4 Q. B. 379.

the chattel ; thus, in *Randall v. Newson* (*l*), plaintiff bought a pole for his carriage from the defendant, a coach-builder. The pole broke in use, and the horses, becoming frightened, were injured. The jury found that the pole was not reasonably fit for the carriage, but that defendant was not negligent. Held, that the defendant was liable.

Province of judge and jury in actions for negligence —“The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred ; the jurors have to say whether from those facts, when submitted to them, negligence ought to be inferred ” (*m*).

What must plaintiff prove before the judge can allow the evidence to go to the jury ?

- (1) Where there is no contract between the parties, plaintiff must prove facts inconsistent with due diligence on defendant's part. Thus, no negligence can be inferred from the fact of a foot-passenger being knocked down by a carriage where both have an equal right to be, or by a train at a level crossing. “Where the balance is even as to which party is in fault, the one who relies upon the negligence of the other is bound to turn the scale ” (*n*).

(*l*) (1877), 2 Q. B. D. 102.

(*m*) Per Cairns, L. C., in *Metropolitan Railway Co. v. Jackson* (1877), L. R. 3 App. Ca. 197.

(*n*) Per Erle, C. J., in *Cotton v. Wood* (1860), 8 C. B. N. S. 568 ;

- (2) Where there is a contract between the parties, and, probably, when there is a personal undertaking without a contract, plaintiff need only prove such contract or personal undertaking and injury to himself. It is for the defendant to prove that he himself was exercising due care—*e.g.*, a collision between trains under defendant company's control, whereby a passenger is injured, is *prima facie* proof of negligence, and it is upon defendant to rebut such presumption if he can (*o*).
- (3) Again, there is a presumption of negligence when the cause of mischief is apparently under the defendant's control. In *Scott v. London Dock Co.* (*p*), a custom-house officer, being lawfully and by right in certain docks, was knocked down by a bag of sugar which fell from defendant's crane. In *Kearney v. L. B. & S. C. Rail. Co.* (*q*), a brick fell from defendant's bridge on plaintiff walking in the road below. In *Byrne v. Boadle* (*r*), a bag of flour fell from defendant's warehouse, in Liverpool,

29 L. J. C. P. 333; *Hammack v. White* (1862), 11 C. B. N. S. 588; 31 L. J. C. P. 129; *Wakelin v. L. & S. W. Railway Co.* (1886), 12 App. Cas. 41.

(*o*) *Carpue v. L. & B. Railway Co.* (1844), 5 Q. B. 747, 751.

(*p*) (1865), 34 L. J. Ex. 220.

(*q*) (1871), L. R. 6 Q. B. 759.

(*r*) (1863), 2 H. & C. 722.

on plaintiff walking in the street below. In all these cases *res ipsa loquitur*, it being held that the mere unexplained fact of the accident happening at all was evidence of negligence.

The doctrine of contributory negligence.—Though negligence whereby actual damage is caused is actionable, yet if plaintiff has himself been guilty of such negligence as is in reality the proximate or decisive cause of the injury complained of, and but for which such injury would not have happened, he cannot recover. Not every act of negligence on plaintiff's part will prevent him from recovering; "only if he has been negligent in the final stage, and at the decisive point of the event, so that the mischief, as and when it happens, is immediately due to his own want of care, and not to the defendant's" (*s*).

In *Fordham v. L. B. & S. C. Rail. Co.* (*t*), defendant's guard, without warning, forcibly closed the door of a railway carriage, thereby injuring plaintiff's hand. Held, there was no contributory negligence on plaintiff's part. In *Richardson v. Metropolitan Rail. Co.* (*u*), there were the same facts, but the guard gave due warning before shutting the door. Held, that plaintiff was disentitled, by his contribu-

(*s*) Pollock, 5th ed. p. 430.

(*t*) (1868), L. R. 3 C. P. 368.

(*u*) (1868), L. R. 3 C. P. 374, n.

tory negligence, from recovering. In *Butterfield v. Forrester* (x), plaintiff, riding violently home in the dusk, came against a pole left by defendant in the highway, and was thrown from his horse and injured. Held, defendant was not liable, owing to plaintiff's contributory negligence.

Another way of stating the above rule is, that plaintiff's negligence will not prevent him from recovering, if defendant, by being ordinarily careful, might have averted the consequence of such negligence. The leading case which may be said to have settled the doctrine of contributory negligence in its modern form is *Tuff v. Warman* (y), which was an action against the pilot of a Thames steamer for running down a barge. Though no look-cut was kept on the plaintiff's barge, defendant was held liable on the above ground. The earlier and well-known case of *Davies v. Mann* (z) is an illustration of the same rule. In that case the plaintiff had negligently left his donkey, with its legs tied, in the public highway, and defendant drove over and killed it. Held, defendant was liable on the above ground.

In *Wakelin v. L. & S. W. Rail. Co.* (a), an action

(x) (1809), 11 East, 60; 10 R. R. 433.

(y) (1857-8), 2 C. B. N. S. 740.

(z) (1842), 10 M. & W. 546.

(a) (1887), 12 App. Ca. 41. See also *Davey v. L. & S. W. Rail. Co.* (1883), 12 Q. B. D. 70; and cf. *Smith v. South Eastern Rail. Co.*, (1896) 1 Q. B. 178.

under Lord Campbell's Act was brought by the widow of a man who was found killed on a level crossing of defendant company's line, there being no evidence as to how he came to be there. The defendant company was held not liable; for even assuming (but without deciding) that there was evidence of defendant company's negligence, there was no evidence to connect such negligence with the accident.

Contributory negligence of children.—A child is to be judged as a child, and is not to be expected to exercise the same amount of care as a person of mature years. He must not, however, get into mischief to the extent of doing what he knows to be wrong. If he does, he is guilty of contributory negligence, which will disentitle him from recovering.

In *Lynch v. Nurdin* (b), defendant negligently left a horse and cart unattended in the street. Plaintiff, aged seven, climbed on the cart in play, and another child led the horse on, whereby plaintiff was thrown down and hurt. Held, that defendant was liable on the above ground. This case was doubted in *Lygo v. Newbold* (c); and the tendency of later authorities is in the direction of limiting defendant's responsibility in such cases.

In *Abbott v. Macfie* (d), plaintiff, aged seven, got

(b) (1841), 1 C. B. 29.

(c) (1854), 9 Ex. 302.

(d) (1864), 33 L. J. Ex. 177.

upon the cover of a cellar left leaning against a wall by defendant. The cover fell, injuring plaintiff. Held, he could not recover. In *Mangan v. Atterton* (e), defendant left unattended a machine which anyone could set in motion, and plaintiff, aged four, by the direction of his brother aged seven, put his hands in the machine while his brother turned the wheel. The plaintiff was injured, but it was held that defendant was not liable. In *Singleton v. Eastern Counties Rail. Co.* (f), plaintiff, aged three, was injured by a passing train while sitting on a railway parapet. Held, that the company was not liable, rather however on the ground that there was no evidence of negligence against the defendant than that the plaintiff was disentitled from recovering by reason of contributory negligence.

The common law rule of contributory negligence is not part of the maritime law administered in courts of Admiralty jurisdiction, the loss being equally divided in case of collision where both ships are in fault; and this rule was expressly reserved in the Admiralty Division by the Jud. Act, 1873, s. 25, sub-s. (9). This rule of the Admiralty Court is, however, to some extent superseded by the provisions of sect. 419, sub-s. (4), of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

Doctrine of identification.—According to *Thorogood*

(e) (1866), L. R. 1 Ex. 239. (f) (1859), 7 C. B. N. S. 287.

v. *Bryan* (g), if A., travelling in B.'s carriage, driven by B.'s servant, is injured in a collision with C.'s carriage, the negligence of B.'s servant being the proximate cause of the accident, A. was considered to be so identified with B. as to be disentitled from suing C. This is no longer the law since the judgment of the Court of Appeal in *The Bernina* (h), in which case there was a collision between two ships, both in fault. The officer in charge, the chief engineer off duty, and a passenger, all belonging to the same ship, were drowned. Held, in an action against the owners of the other ship, overruling *Thorogood v. Bryan* (g), that the representatives of the officer in charge, who was directly responsible for the navigation of the ship at the time of the collision, could recover nothing, but that the representatives of the chief engineer and passenger could do so; the law being that where damage is sustained by the concurrent negligence of two or more persons, there is a right of action against all or any of them at plaintiff's option, and the exception of contributory negligence extends only to the acts and defaults of plaintiff himself, or of those who are really his agents. *Waite v. N. E. Rail. Co.* (i) was distinguished and approved

(g) (1849), 8 C. B. 115.

(h) (1887), 12 P. D. 36; affirmed by the House of Lords, nom. *Mills v. Armstrong* (1888), 13 App. Cas. 1.

(i) (1859), E. B. & E. 719.

on the ground that persons dealing with an adult and also with an infant or imbecile of whom the adult has charge, are entitled to expect reasonable care on the part of the adult, both for himself and for the helpless person in his charge. In the case last cited, the plaintiff, a little boy, aged five, and his grandmother, were knocked down in crossing a line; the former was much injured, the latter killed. Held, that the little boy was so identified with his grandmother that her negligence was his, and, on this ground, that the plaintiff was disentitled from recovering by reason of contributory negligence.

OF CERTAIN WIDER DUTIES IMPOSED BY THE POLICY
OF THE LAW IN CERTAIN SPECIAL CASES.

“Everyone must so use his own as not to do damage to another.” This was laid down as law nearly two hundred years ago by Holt, C. J., in *Tenant v. Goldwin* (*j*), and it is the principle of the leading case of *Rylands v. Fletcher* (*k*).

Sic utere tuo ut alienum non lædas. “A person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does

(*j*) (1705), 2 Lord Raym. 1092.

(*k*) (1868), L. R. 3 H. L. 330.

not do so is *primâ facie* answerable for all the damage which is the natural consequence of its escape" (*k*). In *Rylands v. Fletcher* (*l*), the defendants employed a competent engineer to make them a reservoir. Certain old mine shafts were discovered and filled in unknown to the defendants. The water escaped through the shafts and injured plaintiff's mine. Held, the defendants were liable without any question of negligence. Such a person, is not, however, responsible if the escape is due to—

- (1) Causes beyond his own control, and amounting to act of God—*i.e.*, such an accident as human foresight could not be reasonably expected to anticipate (*m*). In *Nichols v. Marsland* (*n*), the defendant owned artificial lakes, formed by damming a natural stream, into which the water was finally let off by a system of weirs. Owing to a violent storm, an overflow occurred which carried away four county bridges, whereby the action. Held, defendant was not liable;
- (2) Plaintiff's fault;

(*k*) Per cur. in *Fletcher v. Rylands* (1866), L. R. 1 Ex. 277; cited with approval by Cairns, L. C., in the House of Lords (1868), L. R. 3 H. L. at p. 339.

(*l*) (1868), L. R. 3 H. L. 330.

(*m*) *Nugent v. Smith* (1876), 1 C. P. D. 441.

(*n*) (1875), L. R. 10 Ex. 355.

- (3) Wrongful act of third party (o) ;
- (4) Artificial work maintained for the common benefit of plaintiff and defendant. In *Carstairs v. Taylor* (p), the defendant was the plaintiff's landlord, and was living on the floor above him. Some rats gnawed a rain-water box maintained by the defendant for the benefit both of himself and the plaintiff, and the water running through injured plaintiff's goods below. Held, no action lay.
- (5) An act authorised by statute (q).

This of course, however, pre-supposes that the damage has been solely caused by the act of God, or of a third party, &c., and that the defendant has not contributed to it by some distinct breach of duty, as in *Nitro-Phosphate Co. v. Lond. & St. Kath. Dock Co.* (r), for in such a case the defendant will not be excused.

Keeping in cattle.—The owner of cattle must keep them from straying on the land of others at his peril, though he is liable only for natural and probable consequences, not for an unexpected event—*e.g.*, damage caused by the kick of a horse not known to be vicious (s).

(o) *Box v. Jubb* (1879), 4 Ex. D. 76.

(p) (1871), L. R. 6 Ex. 217.

(q) *Dixon v. Metropolitan Board of Works* (1881), 7 Q. B. D. 418 ; and see p. 14, *supra*.

(r) (1878), 9 Ch. D. 503.

(s) *Cox v. Burbidge* (1863), 13 C. B. N. S. 430 ; 32 L. J. C. P. 89.

But this rule has no application to damage done by cattle straying off a highway along which they are being lawfully driven. In such a case the owner is only liable on proof of negligence. In *Tillett v. Ward* (t), an ox, whilst being driven through a town, ran into a shop and there did damage. Held, the owner was not liable.

Liability of owners of ferocious animals for injuries committed by them :—

1. **Always liable for injuries of animals naturally ferocious—i. e., animals by their very nature likely to do injury.** “Though he have no particular notice that he did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yea, an ape or a monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage” (u). Thus, in *May v. Burdett* (x), the owner of a monkey was held liable for the animal biting a lady, and in *Filburn v. The People’s Palace and Aquarium Co., Limited* (y), the plaintiff recovered damages for injuries inflicted upon him by an elephant exhibited by the defendants.

(t) (1882), 10 Q. B. D. 17.

(u) Hale’s Pleas of the Crown, vol. i., p. 430.

(x) (1846), 9 Q. B. 101.

(y) (1890), 25 Q. B. D. 258.

2. Liable for injuries of animals not naturally ferocious,—*i.e.*, animals not by their nature likely to do injury—on proof of *scienter*, *i.e.*, previous knowledge of the creature's mischievous propensities. Therefore it was formerly held that the owner of sheep or cattle worried by a dog could not recover damages from the owner of the dog without proof of *scienter*. Now, however, "a dog is no longer entitled even to one worry," for by 28 & 29 Vict. c. 60, the owner of worried sheep or cattle can recover damages without proof of *scienter*. The term "cattle" comprises horses (*z*), and perhaps pigs (*a*).

At common law a man was bound at his peril to safely keep his own fire so as not to do damage to another; but by the Building Act (14 Geo. 3, c. 78), s. 86, as interpreted in *Filliter v. Phippard* (*b*), a man is not liable for damage caused by a fire which began in his house or on his land, provided that it originated by accident, and without negligence.

A man who brings fire dangerously near the property of another by running a locomotive engine without express statutory authority, or by running

(*z*) *Wright v. Pearson* (1869), L. R. 4 Q. B. 582.

(*a*) *Child v. Hearn* (1874), L. R. 9 Ex. 176.

(*b*) (1847), 11 Q. B. 347.

a traction engine on the highway, does so at his peril (c).

As regards liability attending the use of specially dangerous things, the courts have been chiefly occupied with cases of a similar nature to those set out above; but other instances have from time to time, though less often, engaged their attention. This branch of the law cannot as yet be regarded as settled, but it is submitted that persons using things in their nature specially dangerous, such as loaded firearms, explosives, and poisonous drugs, do so at their peril, and are liable for any damage arising therefrom, wholly irrespective of any question of negligence. See the cases of *Dixon v. Bell* (d), *Farrant v. Barnes* (e), *George v. Skirington* (f), *Langridge v. Levy* (g), and the American case of *Thomas v. Winchester* (h), and on the whole of this somewhat doubtful subject see Pollock, 5th ed. pp. 472—477.

(c) *Jones v. Festiniog Railway Co.* (1868), L. R. 3 Q. B. 733; *Powell v. Fall* (1880), 5 Q. B. D. 597; *Sadler v. South Staffordshire, &c. Co.* (1889), 23 Q. B. D. 17.

(d) (1816), 5 M. & S. 198; 17 R. R. 308.

(e) (1862), 11 C. B. N. S. 553.

(f) (1869), L. R. 5 Ex. 1.

(g) *Supra*, p. 144.

(h) (1852), 6 N. Y. 397.

CHAPTER XI.

OF CERTAIN MISCELLANEOUS MATTERS.

THE text-books state that where a tort is also a felony, there is no right of action until the wrongdoer has been prosecuted for the crime, and in 1885, in the case of *Appleby v. Franklin* (a), Wills, J., in a Divisional Court, said, "The authorities . . . leave no room for doubt that no action can be maintained for a civil injury resulting to the plaintiff from a felonious act on the part of the defendant, until public justice has been vindicated by a prosecution of the criminal."

On the other hand, in the case of *The Midland Insurance Co. v. Smith* (b), in the course of an elaborate judgment reviewing all the authorities on the question, Watkin Williams, J., said, "In the case of *Ex parte Ball, In re Shepherd* (c), in 1879, the doctrine that it was a condition precedent to the enforcing the civil remedy that the felon should have

(a) 17 Q. B. D. at p. 95.

(b) (1881), 6 Q. B. D. at p. 574.

(c) 10 Ch. D. 667.

been first prosecuted, if it ever had any solid foundation, was finally exploded."

The attention of the Court in *Appleby v. Franklin* was not, however, drawn either to the case of *Ex parte Ball* or to that of *The Midland Insurance Co. v. Smith*, and the law on this point cannot therefore be considered as settled.

It used to be said that the trespass was "merged in the felony," which until 1870 was practically true, as up to that date, on conviction of felony, the felon's property was forfeited to the Crown, and therefore it was useless to bring an action. "The principle upon which the rule is founded seems to be that the interest of the public requires that the law shall be vindicated before the individual who is wronged shall be permitted to have recourse to a civil remedy" (*d*).

The rule, if it exists, has no application—

1. To misdemeanours.
2. Where the plaintiff is not the person injured by the felonious act of the defendant (*e*).
3. Where the defendant is some person other than the person guilty of the crime (*f*).

Moreover, it is not known how the rule can be

(*d*) Per Huddleston, B., in *Appleby v. Franklin* (1885), 17 Q. B. D. at p. 94.

(*e*) *Osborn v. Gillett* (1873), L. R. 8 Ex. 88; *Appleby v. Franklin* (1885), 17 Q. B. D. 93.

(*f*) *White v. Spottigie* (1845), 14 L. J. Ex. 99.

enforced. It is certainly no ground for the judge at the trial to direct a non-suit (*g*), nor is the Statement of Claim bad for showing on the face of it that the wrongful act is a felony (*h*). The rule cannot be raised by plea, since then the party sets up his own criminality. In *Wells v. Abrahams* (*i*), Cockburn, C.J., and Blackburn, J., suggest that if an action were brought against a person who was either being prosecuted for felony or liable to such prosecution, the summary jurisdiction of the Court might be invoked to stay proceedings which would involve an undue use, probably the abuse, of the process of the Court; whilst in *Appleby v. Franklin* (*j*) the Court were apparently of the same opinion, and, though the case went off on another point, it certainly appears from the report that the Court would, if necessary, have been prepared to enforce the rule by striking out the Statement of Claim. Thus Huddleston, B. (*k*), said, "It seems to be clear . . . that it is in the power of the Court to strike out the claim upon a summary application." There is, however, no case where this power has in fact been exercised, and, as already

(*g*) *Wells v. Abrahams* (1872), L. R. 7 Q. B. 563, overruling *Wellock v. Constantine* (1863), 2 H. & C. 146.

(*h*) *Roope v. D'Avigdor* (1883), 10 Q. B. D. 412; *Midland Insurance Co. v. Smith* (1881), 6 Q. B. D. 561.

(*i*) (1872), L. R. 7 Q. B. 563.

(*j*) (1885), 17 Q. B. D. 93.

(*k*) 17 Q. B. D. at p. 94.

stated, the attention of the Court in *Appleby v. Franklin* was not drawn to the various authorities on the question. In *Ex parte Elliott* (l), the rule was effectually applied to exclude a proof in bankruptcy; while in *Ex parte Ball, In re Shepherd* (m), though it was admitted to be the expressed opinion of centuries, it was severely criticised by Bramwell, L. J., but unfortunately it was not there necessary to decide the point.

The difficult subject usually described by the misleading phrase "**Tort founded on contract**," cannot be treated satisfactorily in the limited space of this work. The reader is referred to Pollock, 5th ed., Chap. XIII. (where a full discussion of the subject will be found), and it should be observed that the key to the subject is, that the right of action is independent of the contract, and that the contract on the same subject is merely accidental. The following cases are worthy of especial note:—

Denton v. G. N. R. (n): An intending passenger was held to have a remedy for damage caused by acting on an erroneous announcement in a time-table, probably on the ground of the time-table amounting to a proposal of contract; certainly on the ground of its being a false representation.

(l) (1837), 3 M. & A. 110.

(m) (1879), 10 Ch. D. 693.

(n) (1856), 5 E. & B. 860.

Austin v. G. W. R. (o) : Plaintiff—a child just above the age at which children can pass free of charge—was injured by an accident on defendants' line whilst travelling with his mother, who had taken a ticket for herself only. Held, the company was liable, either as having contracted to carry the mother and her child, or, independently of contract, because the child was accepted as a passenger, and this cast a duty on the company to carry him safely.

Marshall v. York, Newcastle, and Berwick Rail. Co. (p) : Plaintiff successfully sued defendant company for the loss of his luggage by the company's negligence, though the ticket was paid for by his master, on the ground that the company had accepted the servant and his luggage to be carried, and were answerable under the general duty thus arising; a duty which would still exist if the passenger and his luggage had been lawfully in the train without any contract at all.

Foulkes v. Metrop. District Rail. Co. (q) : Plaintiff, a passenger, was hurt on alighting at a station, owing to the carriages being unsuited to the platform. The station and platform belonged to the South-Western Railway Company, by whose clerk the plaintiff's ticket was issued; the train belonged to defendant

(o) (1867), L. R. 2 Q. B. 442.

(p) (1851), 11 C. B. 655.

(q) (1880), 5 C. P. D. 157.

company, who had running powers over the South-Western line. Held, defendant company was liable, even if plaintiff's contract were with the South-Western Railway Company, solely on the ground that defendant company actually received plaintiff as a passenger, and thereby undertook the duty of not exposing him to unreasonable peril in any matter incident to the journey.

Alton v. Midland Rail. Co. (r) : Plaintiff sued defendant company for loss of services of his servant, who was injured by defendant company's negligence whilst travelling on their line, the servant having paid for his ticket. It was held that no action lay, on the ground that the injury was caused by a breach of duty arising wholly out of the company's contract with the servant. Although this case has not been overruled, "it has," as Lindley, L.J., recently pointed out in the Court of Appeal (s), "been criticised and commented upon somewhat adversely"; and it is submitted that it is bad law, as being inconsistent with the principles laid down in *Marshall v. Y. N. & B. Rail. Co.*, and *Foulkes v. M. D. Rail. Co.* (t), which proceed on the existence of a duty, not only

(r) (1865), 19 C. B. N. S. 213.

(s) In *Taylor v. Manchester, Sheffield, & Lincolnshire Ry. Co.*, (1895) 1 Q. B. at p. 139.

(t) *Supra*, p. 171. See also *Kelly v. Metropolitan Ry. Co.*, (1895) 1 Q. B. 944; *Meux v. G. E. Ry. Co.*, (1895) 2 Q. B. 387.

in form, but in substance, independent of contract. "The test question, whether the reception of the plaintiff's servant as a passenger would not have created a duty to carry him safely if there had not been any contract with him, is not directly or, it is submitted, adequately dealt with. . . . A directly contrary decision has been given in the State of Massachusetts" (*u*).

As a general rule of the common law the death either of the tort-feasor or of the party injured puts an end to the right of action for a tort.—This rule has been so far extended as to bar a master's right to sue for injuries to his servant which have resulted in the latter's death (*x*). It is usually expressed in the maxim, *Actio personalis moritur cum personâ*, a maxim which is apt to mislead, for it appears to include contracts which, with the exception of promises of marriage (*y*), it does not, and never did. Executors have always been on the one hand able to sue, and on the

(*u*) Pollock, 5th ed. p. 513; and see the American case of *Ames v. Union Ry. Co.* (1875), 117 Mass. 541, which expressly follows *Marshall's case*.

(*x*) *Osborn v. Gillett* (1873), L. R. 8 Exch. 88.

(*y*) Executors cannot sue for breach of promise of marriage without proof of special damage to their testator's personal estate: *Chamberlain v. Williamson* (1814), 2 M. & S. 408; 15 R. R. 295. Nor does the action lie against executors without special damage: *Finlay v. Chirney* (1888), 20 Q. B. D. 494.

other liable to be sued, on contracts entered into by their testator. The rule is now subject to the following exceptions :—

I. In relation to the death of the injured person.

- (1) By statutes temp. Edw. 3 (4 Edw. 3, c. 7; 25 Edw. 3, c. 5), where an injury has been committed to the goods and chattels of a person who afterwards dies, the right of action survives to his executors and administrators.
- (2) By stat. 3 & 4 Will. 4, c. 42, s. 2, where there has been an injury to the real estate of any person, and such person dies, the right of action survives to his executors or administrators, provided (i) the injury was committed within six months of owner's death; *and* (ii) the action is brought within one year after death.
- (3) By the Fatal Accidents Act, 1846, 9 & 10 Vict. c. 93 (commonly known as Lord Campbell's Act), s. 1, "where a person's death is caused by the wrongful act, neglect, or default of another, and the injured person, if he had lived, could have maintained an action, and recovered damages in respect thereof, the person who would have been liable in such case shall be liable to an action for damages, notwithstanding the death of the injured person, and although the death shall have

been caused under such circumstances as amount in law to a felony.”

By sect. 2, such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased.

By 27 & 28 Vict. c. 95, where there is no executor or administrator, or if no action is brought within six months by him, the action may be brought in the name or names of all or any of the persons for whose benefit the personal representative would have sued.

Lord Campbell’s Act is a very strange one; it did not reverse the common law maxim, as it surely ought to have done, but only allows the representative to sue if he or she falls within a very limited and clearly-defined class of persons (husband, wife, parent, and child). “Parent” includes grandfather, grandmother, stepfather, stepmother; and “child” includes grandchild and stepchild, a child *en ventre sa mère* (z), but not an illegitimate child (a).

The jury must apportion the damages awarded amongst the persons for whose benefit the action is brought. By sect. 4, the action must be brought within one year after death, and only one action can be brought for the same cause of complaint.

(z) *The George and Richard* (1871), L. R. 3 Ad. & Ecc. 466.

(a) *Dickinson v. N. E. Ry. Co.* (1863), 2 H. & C. 735.

The parties for whose benefit the action is brought are to be compensated only for the pecuniary loss they suffer through the death of the deceased. Thus, no action lies for merely nominal damages (*b*) ; nor can the jury lawfully increase the damages by adding a solatium for the mental sufferings incurred by the death (*c*) ; nor can funeral expenses be recovered (*d*) ; but a legal right to receive benefit from the deceased need not be shown (*e*). In the words of Pollock, C. B., in *Franklin v. S. E. Rail. Co.* (*f*), “the damages . . . should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life.”

There is no action if the deceased has accepted satisfaction for his injuries before his death, nor if the loss arises not from the relationship, but through some contract, with the deceased.

- (4) By the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1, where a workman whilst engaged in his employer's service sustains personal injury from certain causes specified in the Act (see pp. 33—39, *supra*) and “the

(*b*) *Duckworth v. Johnson* (1859), 29 L. J. Ex. 25.

(*c*) *Blake v. Mid. Ry. Co.* (1852), 18 Q. B. 93.

(*d*) *Dalton v. S. E. Ry. Co.* (1858), 4 C. B. N. S. 296.

(*e*) *Franklin v. S. E. Ry. Co.* (1858), 3 H. & N. 211.

(*f*) (1858), 3 H. & N. at p. 214.

injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work" (g).

- (5) By the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 7 (2) (see pp. 39—41, *supra*), "any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom compensation is payable. 'Dependants' means in England such members of the workman's family specified in the Fatal Accidents Act, 1846 (see pp. 174—176, *supra*), as were wholly or in part dependent upon the earnings of the workman at the time of his death."

II. In relation to the death of the tort-feasor.

- (1) Independently of statute, where property, or the proceeds of property, belonging to another have been appropriated by the deceased wrong-

(g) 43 & 44 Vict. c. 42, s. 1.

doer, and added to his own estate or moneys, an action lies against the executor of the wrongdoer ; but this rule is limited to the recovery of specific acquisitions, or their value, and can only be maintained if there is some beneficial property or value capable of being measured, followed, and recovered. Thus, an action will lie in respect of ore dug or timber cut by the deceased wrongdoer, but not for an assault, or for ploughing up meadows (*h*).

- (2) By 3 & 4 Will. 4, c. 42, s. 2, an action may be brought against the executors and administrators of the deceased wrongdoer for wrongs done by the deceased to real or personal property, provided—

- (1) The injury was committed within six calendar months of the wrongdoer's death ; and
- (2) The action is brought within six months of the appointment of executors and administrators.

(*h*) *Bishop of Winchester v. Knight* (1717), 1 P. W. 406 ; *Phillips v. Homfray* (1883), 24 Ch. D. 439 ; *Peek v. Gurney* (1873), L. R. 6 H. of L. 377.

CHAPTER XII.

OF REMEDIES AND MEASURE OF DAMAGES

RECOVERABLE.

A. Judicial.

I. An action for damages, which are :—

1. **Nominal.**—A sum of no substantial amount—*e.g.*, $\frac{1}{4}d.$ or $\frac{1}{2}d.$ —awarded with the object of not granting any real compensation. In some cases plaintiff must prove actual damage, or he will fail—*e.g.*, in an action for infringement of right to support of land (*a*), negligence (*b*), nuisance (*c*), deceit (*d*), and in certain cases of slander (*e*).
2. **Ordinary.**—A sum awarded as a fair measure of compensation (*not* restitution) to plaintiff.
3. **Exemplary.**—Expressing indignation at defendant's wrong, not mere compensation to plaintiff—*e.g.*, in an action for seduction (*f*), or trespass accompanied by insult (*g*).

(*a*) *Supra*, p. 59.(*e*) *Supra*, pp. 85, 96.(*b*) *Supra*, p. 150.(*f*) *Supra*, pp. 82, 83.(*c*) *Supra*, p. 63.(*g*) *Merest v. Harvey* (1814),(*d*) *Supra*, p. 138.

5 Taunt. 441 ; 15 R. R. 548.

Measure of damages recoverable.—A wrongdoer is liable for the natural and probable consequences of his act (*h*). He is further liable for any special consequences which may ensue if he has at the time of his wrongdoing notice of the special circumstances, by reason whereof those consequences will naturally and probably ensue as a result of his wrongdoing (*i*), for “the rule with regard to remoteness of damage is precisely the same whether the damages are claimed in actions of contract or of tort” (*k*).

Damages resulting from one and the same cause of action must be assessed and recovered once for all; *contra*, where the same facts give rise to two distinct causes of action. In *Brunsdon v. Humphrey* (*l*), plaintiff, whilst driving in his cab, was injured by defendant's negligence. Having recovered damages in an action for the injury to the cab, he then brought a second action for personal injuries. Held, he was entitled to do so, there being two distinct causes of action.

II. An application for an injunction, which is only granted where damages would not be an adequate remedy. An interim injunction is only granted when

(*h*) *Hadley v. Baxendale* (1854), 23 L. J. Ex. 179.

(*i*) *Ibid.*; *Hydraulic Engineering Co. v. McHaffie* (1878), 4 Q. B. D. 670.

(*k*) Per Lord Esher, M. R., in *The Notting Hill* (1884), 9 P. D. at p. 113.

(*l*) (1884), 14 Q. B. D. 141.

delay would prevent or render extremely difficult the subsequent administration of complete justice.

B. Extra-judicial—roughly comprised under self-help:—

1. Abatement of nuisance (*m*).
2. Expulsion of trespasser (*n*).
3. Peaceable re-entry on land of which possession has been wrongfully taken (*o*).
4. Recaption (*p*).
5. Distress damage feasant; *i.e.*, the taking by an occupier of land of chattels found encumbering or causing damage to his land. Under such circumstances the occupier is entitled to detain the chattels until he is tendered or paid a fair compensation for the injury (*q*).

No more force is to be used and no more damage done than is absolutely necessary.

What is the remedy of a private individual complaining of the infringement of a special statutory duty? Where the statute creating the duty indicates a remedy of a private nature—*i.e.*, a remedy compensating the injured party (*e.g.*; an action for penalties for the use and benefit of such person)—then such

(*m*) *Supra*, p. 64.

(*n*) *Supra*, p. 42.

(*o*) *Supra*, p. 46.

(*p*) *Supra*, p. 75.

(*q*) Addison on Torts, 7th ed., p. 399.

remedy will generally be the only remedy. Where no such remedy of a private nature is provided, the injured party has not necessarily a private right of action. Whether he has or not depends on the scope and language of the statute taken as a whole (*r*). Moreover, there can be no right of action unless the object of the statute is to prevent injury of the nature complained of. In *Gorris v. Scott* (*s*), plaintiff's sheep were washed overboard during a voyage from a foreign port to England, owing to defendant omitting to take the precautions required by the Contagious Diseases (Animals) Act, 1869. Held, defendant was not liable, the object of the statute being to prevent the spread of contagious disease, not to protect animals against the perils of the sea.

In order to maintain an action here in respect of a tort committed outside the jurisdiction, the act complained of must be—

1. **Wrongful by English law.**—Thus, in *The Halley* (*t*), there was a collision in Belgian waters. By Belgian law, but not by English law, the owners of the ship were liable, as the collision was caused by the negligence of a pilot compulsorily on board. Therefore they were held not liable here.

(*r*) *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex. Div. 441.

(*s*) (1874), L. R. 9 Ex. 125.

(*t*) (1868), L. R. 2 P. C. 193, 204.

2. Wrongful by the law of the country where committed (*u*).

3. Not of a purely local nature—*e.g.*, trespass to land (*x*).

Joint tort-feasors may be sued jointly or severally; in other words, where two or more persons have participated in a wrongful act, each wrongdoer is liable for all the damage. Thus, in *Hume v. Oldacre* (*y*), the huntsman was held personally liable for all the damage caused by the hunt. The injured party may sue any one or more of the wrongdoers or all of them; but judgment against one or more is a bar to any further action.

On the same principle a release granted to one or more of the wrongdoers operates as a discharge of the others, "the reason being that the cause of action which is one and indivisible having been released, all persons otherwise liable thereto are consequently released" (*z*). But a covenant not to sue one of two joint tort-feasors does not operate as a release of the other from liability, "the reason being that the joint action is still alive" (*z*).

(*u*) *Blad's case* (1673-4), 3 Swanst. 603; *The M. Mozham* (1876), 1 P. D. 107; *Machado v. Fontes*, (1897) 2 Q. B. 231.

(*x*) *British South Africa Co. v. Companhia de Moçambique*, (1893) App. Cas. 602.

(*y*) (1816), 1 Stark. 352; 18 R. R. 779.

(*z*) Per A. L. Smith, L. J., in *Duck v. Mayeu*, (1892) (C. A.) 2 Q. B. at p. 513.

There is no contribution between wrongdoers—*i.e.*, if one of several has been sued, and damage recovered from him, he cannot claim contribution from the others (*a*), provided that the wrong is so obviously unlawful that no reasonable man in committing it could suppose that he was doing a lawful act (*b*).

(*a*) *Merryweather v. Nizan* (1799), 8 T. R. 186; 16 R. R. 810.

(*b*) *Adamson v. Jarvis* (1827), 4 Bing. 66; cf. *Ramskill v. Edwards* (1885), 20 Ch. D. 100.

CHAPTER XIII.

OF LIMITATION OF ACTIONS.

THE law on the subject of the limitation of actions of tort is contained in the statutes 21 Jac. 1, c. 16, 4 & 5 Anne, c. 3, and 19 & 20 Vict. c. 97, and has been summarised as follows (*a*):—

Trespass to land and goods, conversion, and all other common law wrongs, except slander by words actionable *per se*, and injuries to the person.—Six years.

Injuries to the person.—Four years.

Slander by words actionable *per se*.—Two years.

The statutes begin to run against infants and lunatics on disability ceasing (*b*); and if the defendant is beyond the seas when the right of action arises, the time runs against the plaintiff only from his return. Any action brought against a constable for anything done in the execution of his office (*c*), or against

(*a*) Pollock, 5th ed. pp. 201, 202.

(*b*) Formerly this was also true in regard to married women. Since the Married Women's Property Act, 1882, however, a married woman is no longer under disability, but can sue as if she were a *feme sole*. See p. 6, *supra*, and *Lowe v. Fox* (1885), 15 Q. B. D. 667.

(*c*) 24 Geo. 2, c. 44, s. 8.

any person for an act done in pursuance or execution or intended execution of a statutory or public duty or authority (*d*), must be brought within six months from the date of the act complained of.

Where a wrongdoer fraudulently conceals his wrongful act, the statute does not begin to run in his favour until the person wronged discovers the wrongdoing, or might by reasonable diligence discover it (*e*).

It is important to notice the distinction between wrongs which are actionable per se, and those which are only actionable where the plaintiff can prove that he has suffered actual damage (*f*). In the former case, the statutes begin to run from the time when the wrongful act is committed; in the latter, as for example, where the right to support of land has been infringed, the statutes begin to run not from time of commencement of wrongdoing, but from time of plaintiff's first sustaining actual injury; consequently, plaintiff is not necessarily barred by the Statute of Limitations from maintaining an action seven or eight years after defendant's beginning to do what ultimately resulted in injury to the plaintiff (*g*).

(*d*) Public Authorities Protection Act, 1893, 56 & 57 Vict. c. 61, s. 1, sub-s. (a).

(*e*) *Gibbs v. Guild* (1882), 9 Q. B. D. 59; *Thorne v. Heard*, (1895) App. Cas. 495; and *supra*, pp. 45, 46.

(*f*) See *supra*, p. 179.

(*g*) *Backhouse v. Bonomi* (1861), 9 H. L. C. 503.

In *Darley Main Colliery Co. v. Mitchell* (*h*), the defendant, owner of a coal mine, worked it in 1868, thereby letting down plaintiff's cottages, which defendant repaired. In 1882, owing to the same working in 1868, a further subsidence took place and further damage. Defendant pleaded that the damage took place more than six years after the working of mines had ceased. Held, by the House of Lords, that each subsidence gave a fresh cause of action when arising, and that therefore the action lay.

(*h*) (1886), 80 L. T. 264.

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